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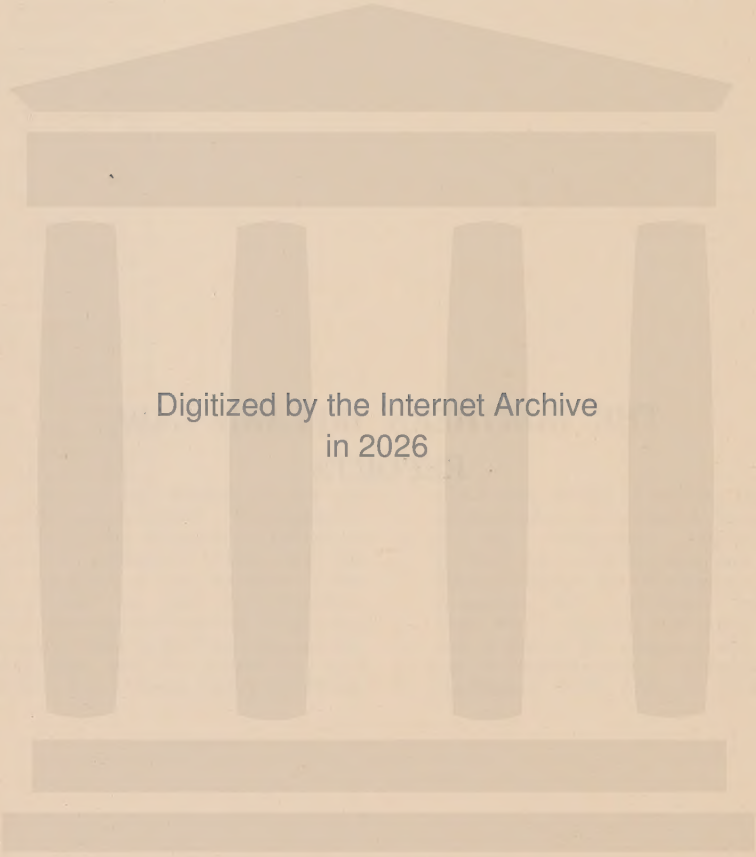

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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

M. G. ELLISON,

ONE OF HIS MAJESTY'S COUNSEL.

1942

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The Right Hon. Sir James Andrews, Bart.

Lords Justices of Appeal:

The Right Hon. Anthony Brutus Babington.
The Right Hon. Edward Sullivan Murphy.

Chancery Division:

The Hon. Robert Dick Megaw.

King's Bench Division:

The Right Hon. Thomas Watters Brown.

Judicial Commissioner Land Purchase Commission

The Hon. Robert Dick Megaw.

Attorney General:

The Right Hon. John C. MacDermott, K.C., M.P.

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[These Reports will be cited as follows :—[1942] N.I.].

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IN

NORTHERN IRELAND.

McCLELLAND v. HYDE.

C.A. 1941.

Oct. 8, 21.

Partnership—Dissolution—Compensation received for goodwill—Whether capital, assets, or profits.

The plaintiff and the defendant carried on business in partnership as carriers. Under the partnership agreement the capital of the partnership was £2,700, of which £2,200 was contributed by the plaintiff and £500 by the defendant, and it was thereby agreed that out of the net profits for each year there should be paid to each partner interest at five per cent. per annum on the capital invested by him, and that the balance of such profits should belong to the partners in equal shares, and that in the event of the dissolution of the partnership a general account of the partnership property should be taken and the net profits should belong to the partners in equal shares, and that the capital should be divided between the partners in proportion to the capital invested in the partnership by the partners as thereinbefore stated.

The partnership business was compulsorily acquired by the Northern Ireland Road Transport Board and the partnership was dissolved. The compensation paid in respect of the acquisition included £6,031 for goodwill.

Held, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.JJ.), that the compensation for goodwill was not in the nature of capital, but was in the nature either of assets and distributable according to sect. 44 of the Partnership Act, 1890, or in the nature of profits and distributable as profits in equal shares under the partnership agreement.

APPEAL from the order of Megaw, J., in an action for an account of the property and profits of the

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business formerly carried on in partnership by the plaintiff and the defendant.

On 5th February, 1921, the plaintiff and the defendant entered into an agreement to carry on in partnership the business of carriers previously carried on by the plaintiff.

The relevant clauses of the agreement were as follows :—

"5. The capital of the partnership shall consist "of the sum of £2,700 to be brought in by the "partners as follows, viz., by the said George "McClelland the sum of £2,200, being the value of "the premises in Meadow Lane, Portadown, and "the vehicles and stock now in use by him, and by "the said George Hyde, the sum of £500.

"9. On 31st December in each year a general "account shall be made and taken of all business "and transactions of the partnership during the "preceding year and of all the capital, property, "engagements and liabilities of the partnership "and of the net profits of the partnership for the "year then ending.

"10. Out of the net profits of the partnership "there shall be paid to each partner interest at the "rate of five per cent. per annum on the capital of "such partner in the business as hereinbefore "declared and the balance of such profits shall "belong to the partners in equal shares. In the "case of loss the loss shall be borne by the partners "in equal shares.

"12. On the dissolution or termination of the "partnership a general account of the partnership "property shall be taken and made and net profits "disposed of as hereinbefore set forth, and the "capital shall be divided between the partners or "their legal representatives in proportion to the "capital now invested in the partnership by the "partners as hereinbefore stated."

The partnership business was compulsorily acquired by the Northern Ireland Road Transport Board under the Road and Railway Transport Act (Northern Ireland), 1935, and compensation was paid as follows :

£6,031 for goodwill, £1,732 for assets and £75 for leasehold property.

The plaintiff brought an action to have an account taken of the property and profits of the business of the partnership. The net point in issue was whether the sum of £6,031 paid in respect of goodwill was to be regarded as capital and divisible as such in accordance with Clause 12 of the Agreement. Megaw, J., held that this sum was to be treated as capital.

The defendant appealed from this order.

Beattie, K.C., and *Warnock, K.C.* (with them *Hanna*), for the appellant :—

The surplus after allowing for debts, capital, interest and other proper deductions should be divided equally between the partners, being in the nature either of profits or, alternatively, of assets.

(1) The surplus is in the nature of profits. The principles applied in *Lubbock v. British Bank of South America* (1), and *Bond v. Barrow Haematite Steel Co.* (2), with respect to companies should be applied to the present case in default of any provision to the contrary in the partnership Agreement. Unless there is an agreement to the contrary the capital of an undertaking is fixed and does not vary with the fluctuation in value of the assets in which it may be invested. Any accretion to that fixed fund is profit. *Binney v. Mutrie* (3), *Robinson v. Ashton* (4), *Bishop v. Smyrna and Cassaba Railway Co.* (5), *Dinham v. Bradford* (6), *Watney v. Wells* (7).

(2) Alternatively, the surplus is in the nature of assets of the partnership. The capital of the undertaking is fixed. As no provision is made for the distribution of any money representing assets it passes under the provisions of sect. 44 of the Partnership Act, 1890. This section draws a clear distinction between capital and assets. They referred to *Watney v. Wells* (7).

(1) [1892] 2 Ch. 198.
(2) [1902] 1 Ch. 353.
(3) 12 A.C. 160.
(4) L.R. 20 Eq. 25.
(5) [1895] 2 Ch. 265.
(6) L.R. 5 Ch. 519.
(7) L.R. 2 Ch. 250.

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Chambers, K.C. (with him *Sheil*), for the respondent :

None of the authorities cited apply, because they refer to cases where money is to be divided either in the absence of agreement as to its distribution or in accordance with a specific agreement in the matter. Sect. 44, Partnership Act, 1890, only operates in default of any agreement. In this case the whole matter turns upon the true construction of the Agreement.

The provision in clause 12 that the capital shall be divided " in proportion to the capital now invested " implies that capital includes assets representing capital, otherwise the clause would specify the division to be in the proportion of twenty-two to five. The words used indicate that it was contemplated that on dissolution the assets representing capital might exceed, or fall short of, the original capital invested. Goodwill is not profit. *Wedderburn v. Wedderburn* (1). *In re The Spanish Prospecting Co., Ltd.* (2). It must then be capital. The compensation in respect of goodwill cannot become profit merely because it has taken the form of cash. When the vesting order was made the partnership was dissolved and no more profits could be earned. The compensation subsequently received was a capital sum representing the redemption value of future annual profits.

Beattie, K.C. (in reply) :—

The argument for the plaintiff involves ascribing two different meanings to " capital " in clause 12. In *In re The Spanish Prospecting Co., Ltd.* (2), Fletcher Moulton, L.J., did not decide that goodwill is capital, but only that it is not profit such as can be included in an annual account.

Cur. adv. vult.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This is a suit for dissolution of a partnership business formerly carried on at Portadown by the plaintiff and the defendant as furniture removers and carriers under an Agreement, dated 5th February, 1921. It is to be regretted that the pleadings were

(1) 22 Beav. 84. (2) [1911] 1 Ch. 92.

prepared in such perfectly general terms that they gave no indication whatever of the only point upon which Mr. Justice Megaw's decision was sought at the hearing, and upon which our opinion is invited upon this appeal. That question is the manner in which the sum paid by the Northern Ireland Road Transport Board for the goodwill of the business (stated, but not proved, to amount to £6,031), should be distributed between the two partners on the dissolution of the partnership business.

The answer to the question necessitates a careful consideration of the terms of the partnership Agreement. Clause 1, which provides for the parties becoming partners, refers to the business as being then carried on by the plaintiff under the name of Anderson and Company. Clause 2 provides for the partnership continuing whilst the partners should both live or until one of them should terminate it in manner therein mentioned. By clause 4 both parties were under obligation to employ themselves in the business of the partnership, neither being permitted to engage in any other business. Next comes an important clause (No. 5), in which it is stated that the capital of the partnership should consist of the sum of £2,700 to be brought in by the partners as follows, viz., by the plaintiff the sum of £2,200, being the value of the premises in Meadow Lane, Portadown, and the vehicles and stock then in use by him, and by the defendant the sum of £500. Clause 9 provides that on 31st December in each year a general account should be made and taken of all business and transactions of the partnership during the preceding year, and of all the capital, property, engagements and liabilities of the partnership, and of the net profits of the partnership for the year then ending. Clause 10 relates to the disposal of such net profits, declaring that out of them there should be paid to each partner interest at the rate of five per cent. per annum on the capital of such partner in the business as thereinbefore declared, and that the balance of such profits (i.e., of such net profits for the year) should belong to the partners in equal shares, any loss being borne in the same shares.

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Clause 11 enables each partner to take out of receipts the sum of £3 10*s.* 0*d.* weekly on account of his share of profits and interest, i.e., as I understand it, that each partner could draw against his prospective share of profits and interest on capital to the extent of £3 10*s.* 0*d.* weekly.

There remains the most important clause of all which provides for the dissolution or termination of the partnership. In either event a general account of the "partnership property" should be taken and made, and, to quote the precise words of the clause, "net profits disposed of as hereinbefore set forth and "the capital shall be divided between the partners "or their legal representatives in proportion to the "capital now invested in the partnership by the "partners as hereinbefore stated."

It is upon this clause that the issue between the parties really arises. On behalf of the plaintiff it is contended that the money paid by the Transport Board in respect of the goodwill of the business is capital which is distributable accordingly in the proportion of 2,200 to 500; whilst the argument presented upon behalf of the defendant is of an alternative character, namely, that it is either "net "profits" within the meaning of that term as used in the Agreement, or that it is an "asset" of the business outside the scope of the Agreement, which by virtue of section 44 (*b*) (4) of the Partnership Act, 1890, must be divided in the proportion in which profits are divisible. In either such alternative case the distribution would be made between the partners in equal shares.

It is clear from the foregoing summary that the capital of the business was *fixed* at £2,700, contributed in the proportions mentioned. I describe it as "fixed" at that figure not only because it is provided that it shall "consist" of that sum, but also because the Agreement contains no provision for its increase or reduction; and it is in my opinion well settled that the agreed capital of a partnership cannot be either added to or withdrawn except with the consent of all the members of the partnership. *Heslin v. Fay* (1). There

(1) 15 L.R.I. 431.

is no suggestion of any such consent in the present case either in the Agreement itself or subsequently. Whilst the assets and liabilities of a partnership are subject to constant fluctuation, and, accordingly, the value of the share of each partner must also constantly fluctuate, this does not affect the amount of the agreed capital of the partnership business. In truth, the capital of a partnership is something different from its property or its assets. The latter necessarily includes everything of value which belongs to the partnership firm, and, accordingly, its goodwill, whilst the capital only includes goodwill when it is brought into the partnership as such. We know nothing as to the value, if any, of the goodwill of the business of Anderson and Company immediately prior to the formation of the partnership; but this we do know, that, whether the business had any goodwill of value or not, it was treated by the parties as of no value, as it was in no way included in the capital of the business. The Annual Accounts of the business were prepared on this basis, goodwill never being introduced as a capital item.

Mr. Chambers in his interesting argument on behalf of the plaintiff suggested that we should give to the word "capital" in the fourth line of the dissolution clause (No. 12) a different and wider meaning than that which it bears in the earlier clauses 5, 9 and 10—a meaning sufficiently wide to include goodwill. His submission was that this is necessitated by the subsequent use in that clause of the words "in proportion "to the capital *now* invested in the partnership," which, he contended, implied that the capital might vary. I am entirely opposed to such a construction which does not appear to me to be in any way compelled in the present case, as full significance and meaning can be given to the words relied upon by recognition of the fact that capital might at any time be varied by consent.

For the reasons stated I am clearly of opinion that the word "capital" in this Agreement does not include goodwill.

In these circumstances the next question to be determined is whether the goodwill of this business,

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for which such a large sum has been paid, is to be regarded as part of the "net profits" of the partnership. I emphasise the word "*net*," for it is to such profits that the Agreement expressly refers in clauses 9, 10 and 12. One thing clear from clause 9 is that the net profits there referred to are the profits "for the year "then ending." As clause 10 declares that the balance of "such profits" (i.e., the balance after payment of interest on capital) shall belong to the partners in equal shares the Agreement obviously contemplates an annual distribution of the entire profits of each year. Such a distribution necessarily prevents the accumulation of profits, and so makes the only profits distributable on a dissolution "net "profits," i.e., net profits for the year or part of the year since the last Annual Accounts.

The terms "profits" and "net profits" have frequently received judicial interpretation. Thus, whilst Farwell, J., expressed the view in *Bond v. Barrow Haematite Steel Co.* (1), that there is no single definition of the word "profits" which will fit all cases; yet no one will, I think, seriously challenge the words of Fletcher Moulton, L.J., in *In re The Spanish Prospecting Co., Ltd.* (2), where he said: "'Profits' "implies a comparison between the state of a business "at two specific dates usually separated by an interval "of a year. The fundamental meaning is the amount "of gain made by the business during the year." "Net profits" is necessarily a term of more restricted meaning than "profits." Kekewich, J., in *Glasier v. Rolls* (3), defined them as the sum divisible after discharging or making provision for every outgoing properly chargeable against the period, whether a year or less, for which the profits are calculated. So again in *Frames v. Bultfontein Mining Co.* (4), where a director sued for remuneration for his services calculated pursuant to the Articles of Association on a percentage basis upon "net profits" for the year, it was held by Chitty, J., that "net profits" in the article in question was intended to apply to profits made by the company

(1) [1902] 1 Ch. 353 at p. 366.
(2) [1911] 1 Ch. 92 at p. 98.
(3) 42 Ch.D. 436 at p. 453.
(4) [1891] 1 Ch. 140.

as a going concern, and not to profits made by a sale of the whole undertaking and assets in a winding-up. The comment which Fletcher Moulton, L.J., made upon this case when giving judgment in *In re The Spanish Prospecting Co., Ltd.* (1), supra at p. 105, is illuminating. "The sale," he said, "included the "goodwill of the business of the company, and there- "fore they were seeking to take the value of the "goodwill of a company into account in ascertaining "its profits. This is fundamentally wrong. The "capital value of goodwill is an alternative to profits, "not part of them. It is the price at which a person "renounces his rights to future profits. Hence the "goodwill of a business can never appear in the "calculation of its profits."

Finally, on the meaning of the term "net profits" I would refer to a very useful passage in the judgment of Kekewich, J., in *Bishop v. Smyrna and Cassaba Railway Co.* (2). "The word 'profits,'" he says, "like many other words in the English language and "even some of a technical character, is capable of "more than one meaning, and it is often, and properly, "used in more than one sense; and it seems to me that "the two different senses of the word 'profits' afford "the key to the solution of the difficulty which I have "now to deal with. In ordinary parlance, among "mercantile men and lawyers, 'profits' mean that "sum which periodically, at the end of the half year, "or year, or other time fixed by agreement, is divisible "among the partners—a term which of course includes "members of a company—as income. It is sometimes "called 'net profits,' only to distinguish it from what "are called 'gross profits.' It is the sum which is "ascertained by the taking of a proper account of "what has been made by trading and is therefore "distributable between the parties entitled. But "the word 'profits' is also used properly in this "sense: when you come to wind up a concern, you "have to pay all the debts; you have to repay to each "partner what he has brought in as capital; and after "that has all been done, if the concern has been a

(1) [1911] 1 Ch. 92. (2) [1895] 2 Ch. 265 at p. 269.

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"successful one, there is a balance, and that balance "is 'profit'; it cannot properly be called anything "else."

I have, perhaps needlessly, referred to these cases merely because I regard them as at least in a measure confirmatory of the construction of the term "net "profits" in the partnership Agreement between the plaintiff and the defendant at which I have quite independently arrived.

If then goodwill cannot properly be regarded as either "capital" or "net profits" of this partnership, the question remains "what is it?"

Romilly, M.R., provided an answer to this question in *Wedderburn v. Wedderburn* (1), in which (at p. 104) he said:—"The goodwill of a trade, although in-"separable from the business, is an appreciable part "of the assets of a concern, both in fact and in "the estimation of a Court of Equity. . . Goodwill "manifestly forms a portion of the subject-matter "which produces profits, which constitutes partnership "property, and which is to be divided between the "surviving partners and the estate of the deceased "partner, according to the terms of the contract, and "when that is silent, according to their shares in the "concern. . . . I am of opinion then that, both on "principle, on the authority of decided cases, and on "the ordinary rules of common sense, I must, when-"ever there is a reputation and connection in business "constituting goodwill, treat that as part of the assets "of the concern."

Jennings v. Jennings (2), *In re David & Matthews* (3), and *In re Leas Hotel Co., Salter v. Leas Hotel Co.* (4), *Hill v. Fearis* (5), and the much older Stamp Act case of *Potter v. Commissioners of Inland Revenue* (6), provide further authority that this goodwill is properly described as "assets," "property" or "effects" of the partnership. In the first of these cases Stirling, J. (at p. 384), said that it was not disputed that the word "assets" includes the goodwill so far as it constitutes

(1) 22 Beav. 84.
(2) [1898] 1 Ch. 378.
(3) [1899] 1 Ch. 378.
(4) [1902] 1 Ch. 332.
(5) [1905] 1 Ch. 466.
(6) 10 Exch. 147.

property—a word which he regarded as a compendious expression for the aggregate of the several items of property belonging to the partnership.

As part of such "assets" the goodwill of this partnership business falls to be distributed under Section 44 (*b*) of the Partnership Act, 1890, the ultimate residue being divided among the partners in the proportion in which profits are divisible, namely, in the present case in equal shares.

I shall only add that this appears to me to be a most equitable result for the distribution of a fund the large proportions of which I find it quite impossible to reconcile with the figures for profits and losses contained in the Trading Accounts of the business.

The appeal must therefore be allowed with costs.

BABINGTON, L.J.: It appears from the Agreement by which this two man partnership was constituted that the plaintiff brought in capital represented by premises, vehicles and stock to the value of £2,200 and the defendant subscribed £500 in cash. Upon this capital the partners built up a business as carriers which has been taken over by the Northern Ireland Road Transport Board who paid them by way of consideration the sum of £1,732 in respect of assets, £6,031 for goodwill and £75 for the interest in certain leasehold premises.

The defendant claims that after net payment of the partnership debts and repayment of the subscribed capital, the balance, which represents the purchase price or part of the purchase price of the goodwill, must be divided equally as a profit. The plaintiff on the other hand contends that the money paid in respect of goodwill is capital and that it should be divided in the proportion of £2,200 to £500 and that he is therefore entitled to 22/27ths of this balance and the defendant to 5/27ths only. This contention appears to be based on a passage from the judgment of Fletcher Moulton, L.J., in *In re The Spanish Prospecting Company Ltd.* (1), from which the conclusion is sought to be drawn that money received for goodwill can never be profits and must therefore be capital. The Lord Justice there

(1) [1911] 1 Ch. 92 at p. 105.

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says that " the capital value of goodwill is an alternative " to profits and not part of them," and this passage has reference to the case of *Frames v. Bultfontein Mining Co.* (1), in which directors entitled to remuneration for their services based on the net profits of the Company in each year claimed that when the company was sold for a large sum, which included the goodwill of the business, they were entitled to take this sum into account in calculating the profits for the year in which the sale took place. Chitty, J., held that they could not do so, and Fletcher-Moulton, L.J., agreed, saying that he could not see how Chitty, J., could have come to any other conclusion.

In the case of *Frames v. Bultfontein Mining Company* (1) what had to be decided was whether the net profits of any year included the profits arising from the sale of the business in that year, and the Lord Justice in the passage cited is merely pointing out that in calculating the net profits of any one year profits arising from the sale of the goodwill cannot be taken into account. I do not understand him to say that profits can never arise from the sale of goodwill, but that the net profits of any one year cannot include profits derived from the sale of goodwill, in which I respectfully agree.

Generally speaking, capital is the money, lands, goods or other property with which the company or partnership commences business. Anything acquired or earned over and above this in the course of business is not capital but profit. It may be earned directly by the capital, or by its means, or by the efforts of the partners or some of them, or by a combination of capital and work. It comes into existence after the business has commenced, having no prior existence, and whether it be earnings in money or kind or accretions to capital or goodwill, it is *profit* as distinguished from *capital.*

The word " profit," generally speaking, means the excess of returns over outlay, but in commercial agreements its meaning may be and often is restricted to annual pecuniary profits or such profits as would

(1) [1891] 1 Ch. 140.

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ordinarily appear in a profit and loss account, as in *Frames v. Bultfontein Mining Company* (1).

By the agreement with which we are dealing in this case the net profits are to belong to the partners in equal shares after payment of interest at five per cent. on the capital subscribed by each, and on dissolution a general account of the partnership property is to be taken, the net profits being disposed of as therein set forth (i.e., equally) and the capital being divided between the partners in proportion to the capital invested in the partnership by the partners. The provision as to the division of the net profits on dissolution does not refer to the same profits as those which are to be divided equally. It contemplates a general account of all the partnership property, which must include the proceeds of the sale of the goodwill, an item which could never have been taken into account in ascertaining the annual net profits for the purpose of distribution while the partnership continued. The money paid for the goodwill represents the purchase price of anticipated profits and is itself a profit though it can only be realized on sale and dissolution. So much of it, therefore, as remains after providing for repayment of capital and the payment of debts must be divided equally among the partners either under the Agreement as being net profits upon dissolution or under section 44 of the Partnership Act, 1890.

I have had the advantage of reading the judgments of the other Members of the Court in which I concur, and it is unnecessary for me to go over the authorities referred to therein. I therefore content myself with saying that they show, if authority be necessary, that the proceeds of the sale of goodwill is not capital, in the absence of a clear provision to this effect in the partnership agreement, and if these proceeds are not capital they can only be profit.

MURPHY, L.J.

MURPHY, L.J. : I concur.

In the course of his opening statement on behalf of the appellant, Mr. Beattie contended that the " consideration money " paid by the Northern Ireland

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Road Transport Board could not be split up, and submitted that there was nothing to show that any part of the total sum of £7,838 was paid in respect of goodwill. Having regard to paragraph 2 of the Defence, the opening statement of Mr Chambers before Megaw, J. (the facts stated in which were, as Mr. Chambers informed us, expressly admitted), the note of the evidence and the order made by the learned Judge, I regard this point as quite untenable. I may point out that the "road transport undertaking" of these partners, which the Road Transport Board acquired, consisted of (1) the "assets," i.e., the road vehicles and stock, (2) premises in Meadow Lane, Portadown, used in connection with the business, and (3) the (alleged) "goodwill" of the business. I think that the admission contained in paragraph 2 of the Defence was wisely pleaded, as although the exact sum paid by the Transport Board in consideration for the goodwill may not be certain, it *is* certain that a large sum was so paid and that this could have been readily proved. Had the averment in paragraph 6 of the Statement of Claim been traversed, the costs of proving it would, properly, have been made payable by the defendant in any event.

As the point was contested in argument, I may say that from the reference to goodwill in section 19 (3) and paragraph 3 of the Second Schedule of the Road and Railway Transport Act (Northern Ireland), 1935, and the distinction between "tangible assets" and "goodwill" in that Schedule, the Transport Board was, clearly, entitled to acquire and pay for the "goodwill" of transport undertakings, as they have done.

The questions therefore for us are: (1) whether or not the sum paid for goodwill by the Transport Board is "profits" distributable as such under the Partnership Agreement. (2) If not "profits," is this sum "assets" of the business as distinguished from capital? or (3) (as Mr. Chambers contends) is this sum "capital" within the meaning of that word when *first* used in Clause 12 of the Partnership Agreement?

To deal with the third question first, I cannot agree with the argument of Mr. Chambers. The word

" capital " is used five times in the Agreement, and certainly in four of these five instances it refers to the capital brought in by the two partners, with possibly such additions to or subtractions from this capital as might have been made. Mr. Chambers asks us to give two different meanings to the word when used in the same clause 12. The sum afterwards paid for " goodwill " was certainly not in the contemplation of the two partners on 5th February, 1921 (the date of the Agreement) and this sum (or the " goodwill ") was never treated by the partners as an accretion to the capital originally brought in.

" Net profits " in clause 12 probably does mean the profits up to the dissolution or termination of the partnership to be ascertained as provided by clause 9, but the provisions in clause 12 were not inserted with a view to such a " windfall " as the sum paid by the Transport Board in respect of " goodwill," and in my opinion these provisions were merely directed to the diminution of the capital brought in by the partners (such diminution in fact having resulted as the Accounts produced to us show), or its, possible, increase by the bringing in of fresh capital by the partners.

I am satisfied that the money paid for " goodwill " cannot be treated as " capital " within the meaning of that word in clause 12 of the Agreement and that this word did not mean " assets representing capital at " the time of dissolution."

If not, it would follow that under the combined effect of section 44 of the Partnership Act, 1890, and clause 10 of the Agreement, the money so paid is divisible in equal shares between the partners whether it be correctly described as " profits " or " assets."

The appeal therefore succeeds, but I desire to express my opinion on this question which has been so strenuously argued before us.

" Goodwill " has been conveniently defined by Sir John Romilly, M.R., in *Wedderburn v. Wedderburn* (1), as " that species of connection in trade which induces " customers to deal with a particular firm." The " goodwill " of a partnership business forms part of the

(1) 22 Beav. 84.

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assets to be realized on dissolution—see Romer, J., *Re David and Matthews* (1): "The goodwill of the "business would be an asset, and might well be the "most valuable asset of the partnership."

Depreciation of goodwill is loss of the "fixed capital" of a company—see *Wilmer v. McNamara & Co. Ltd.* (2), per Stirling, J., at p. 254.

No goodwill, as such, was brought in under the present partnership Agreement and therefore it does not figure in the accounts; while these accounts and the evidence as to the business show that it would be in the highest degree improbable, it is not *impossible* that the goodwill attaching to the business formerly carried on by the plaintiff before the date of the Partnership Agreement and so brought into the partnership in 1921 *might* have been worth the sum subsequently paid for "goodwill" by the Transport Board.

In *Bishop v. Smyrna and Cassaba Railway Co.* (3), Kekewich, J., at p. 269, points out two meanings of the word "profits." "In ordinary parlance, among "mercantile men and lawyers, 'profits' mean that "sum which periodically, at the end of the half year, "or year . . . is divisible among the partners—a "term which of course includes members of a company "—as income. It is sometimes called 'net profits,' "only to distinguish it from what are called 'gross "'profits.' It is the sum which is ascertained by the "taking of a proper account of what has been made "by trading and is therefore distributable between "the parties entitled. But the word 'profits' is also "used properly in this sense: when you come to wind "up a concern you have to pay all the debts, you have "to repay to each partner what he has brought in as "capital; and after that has all been done, if the "concern has been a successful one there is a balance, "and that balance is 'profit,' it cannot properly be "called anything else. Whether you treat it as capital "or whether you treat it as income is perfectly "immaterial."

(1) [1899] 1 Ch. 378 at p. 382.
(2) [1895] 2 Ch. 245.
(3) [1895] 2 Ch. 265.

This distinction between two meanings of "profits" must, I think, be borne in mind in examining the authorities cited to us.

In *Wedderburn v. Wedderburn* (1) (*vid. ante*), Sir John Romilly, at p. 104, says: "The goodwill of a "trade although inseparable from the business is an "appreciable part of the assets of a concern both in "fact and in the estimation of a Court of Equity . . . "Goodwill manifestly forms a portion of the subject-"matter which produces profits, which constitutes "partnership property."

Fletcher Moulton, L.J., in *In re The Spanish Prospecting Company, Ltd.* (2), in commenting on an earlier decision of Chitty, J., says: "The sale included the "goodwill of the business of the company, and there-"fore they (the directors) were seeking to take the "value of the goodwill of the company into account in "ascertaining its profit. This is fundamentally wrong. "The capital value of goodwill is an alternative to "profits, not part of them. It is the price at which a "person renounces his right to future profits. Hence "the goodwill of a business can never appear in the "calculation of its profits."

The case on which the Lord Justice was commenting (*Frames v. Bultfontein Mining Co.* (3)) is a decision of Chitty, J., as to what constituted "net profits" within the meaning of that term in the Articles of Association of a company, and the learned Judge held that the term meant profits as shown in the profit and loss account, as distinct from the profit realized by the sale of the undertaking in the course of voluntary liquidation.

Watney v. Wells (4) (the principles of which were adopted by Lord Hatherley in *Dinham v. Bradford* (5)) emphasizes the distinction between "profits of the "trade in the proper meaning of those words," and the "surplus" or "residue" resulting from a sale of a business on the dissolution of the partnership—which, I think correctly, was referred to by counsel in argu-

(1) 22 Beav. 84.
(2) [1911] 1 Ch. 92 at p. 105.
(3) [1891] 1 Ch. 140.
(4) L.R. 2 Ch. 250.
(5) L.R. 5 Ch. 519.

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ment as "the profits which arose from the surplus "assets and not from the trading."

That accretions to capital when realized may be brought into the profit and loss account of a company and distributed as dividend is well settled, and Mr. Beattie cited cases which illustrate this principle: e.g., *Lubbock v. British Bank of South America* (1) (Chitty, J.); *Bond v. Barrow Haematite Steel Co.* (2), (Farwell, J.). This last is one of the many cases in which the distinction between fixed capital and floating or circulating capital, and its effect on the payment of dividends was discussed (see also *Verner v. General and Commercial Investment Trust* (3), Lindley, L.J., at p. 266), and Farwell, J., at p. 366 says: "There is no single definition of the word 'profits' "which will fit all cases."

In *Robinson v. Ashton* (4), the facts, shortly stated, were that on the formation of a partnership it was agreed that the business should be carried on at a mill, the property of one of the partners, who was credited in the partnership books with the value of the mill. From time to time additions and improvements were made to the mill and in the yearly balance sheets the mill was entered at the original value increased by the amount so expended. On a sale of the business the mill realized far more than its value in the books of the partnership, and Sir George Jessel held that the difference was profit, divisible in the proportions in which the profits of the business were divisible at the time of the sale. He said: "In the absence of special "agreement the rise or fall in the value of fixed plant "or real estate belonging to the partnership was as "much profit or loss of the partnership as anything "else."

In delivering the judgment of the Privy Council in *Binney v. Mutrie* (5), Lord Hobhouse, at p. 165, said (in determining the application of moneys realized on the dissolution of a partnership): "Their Lordships "understand that all claims of persons external to the "partnership have been satisfied. That being so, it

(1) [1892] 2 Ch. 198.
(2) [1902] 1 Ch. 353.
(3) [1894] 2 Ch. 239.
(4) L.R. 20 Eq. 25.
(5) 12 A.C. 160.

" is clear that the surplus assets should first be applied " in paying to each partner his claims in respect of " capital. The residue will be profits, and will be " divisible as such."

From the cases referred to I infer that the "surplus," which has resulted from the acquisition of this road transport undertaking by the Road Transport Board, might be described correctly as " surplus assets " of the partnership and that, although not " net profits " within the meaning of this term in the Partnership Agreement, this surplus is " profit " in the second sense of that word referred to by Kekewich, J., in *Bishop v. Smyrna and Cassaba Railway Co.* (1) (*vid. ante*). Under either description this surplus is divisible equally between the parties, and, as I have said, I agree that the appeal should be allowed.

Solicitor for the plaintiff : *R. M. Cullen.*
Solicitors for the defendant : *Wallace, Harris & Robb.*

M. W. G.

(1) [1895] 2 Ch. 265.

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W. & R. BARNETT, LTD., APPELLANTS;
THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND, RESPONDENT.

Rating—"Freight Transport Hereditament"—Grain Silo—"Dock Undertaking"—Rating and Valuation (Apportionment) Act (Northern Ireland), 1928 (18 & 19 Geo. 5, c. 30, secs. 1, 5, 7)—Construction of Statute—Regard to terms of subsequent statute.

The B. Harbour Commissioners granted to W. & R. B., Ltd., who carried on business as grain importers, a lease of land described as situate adjacent to the North corner of one of the lessor's docks and which was bounded on all sides by other property of the lessors, with liberty to construct and maintain on the demised premises and on a specified area, the property of the lessors adjoining the dock, certain elevators, subways and gantries for discharging grain from ships and delivering it into a grain silo which the lessees thereby covenanted to build. The lease also conferred on the lessees the preferential use of specified portions of the quays adjoining the dock for the discharge and loading of grain in connection with the silo. The silo was built, and was maintained, by the lessees; the distance from the wall of the dock to the nearest part of the silo was 13 feet 10 inches; that intervening part was not included in the lease.

By the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928 (18 & 19 Geo. 5, c. 30), which is stated in the preamble to have been passed with a view to the grant of relief from rates in respect of certain classes of hereditaments, it was enacted that the valuation lists made under the Irish Valuation Acts should show what hereditaments are "freight transport hereditaments"; by the Act "freight transport hereditament" is defined as *inter alia*, "a hereditament having a net annual value exceeding £20 occupied "and used wholly or partly for dock purposes as part of a dock "undertaking, being an undertaking whereof a substantial pro-"portion of the volume of business is concerned with the shipping "and unshipping of merchandize not belonging to or intended "for the use of the undertakers"; "dock purposes" are defined as "all purposes connected with the shipping or unshipping at a dock "of . . . merchandize"; "dock" is defined as including "any "harbour, wharf, pier, jetty or other works, in or at which vessels "can ship or unship merchandise or passengers, not being a pier "or jetty primarily used for recreation"; and "dock undertaking" "is defined as meaning "an undertaking carried on by a dock "authority" but as also including "any other undertaking (not "carried on by a county council or urban district council) comprising "as part thereof a dock in so far only as its business is carried on

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"at and in connection with that dock". The B. Harbour Commissioners are such a dock authority.

By the Local Government (Rating and Finance) Act (Northern Ireland), 1929, a partial relief from rates is granted in respect of hereditaments shown in the valuation lists as freight transport hereditaments.

Held, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.JJ.):—

1. That W. & R. B., Ltd., were not entitled to have the premises shown in the valuation list as a freight transport hereditament.
2. That the Court in considering a question as to the construction of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, was entitled to consider the Local Government (Rating and Finance) Act (Northern Ireland), 1929.

APPEAL from the decision of a Divisional Court (Brown and Megaw, JJ.) upon a case stated by the Recorder of Belfast on the hearing by him of an appeal to Sessions in respect of the description in the valuation lists made under the Irish Valuation Acts, of lands the property of W. & R. Barnett, Ltd.

The facts stated by the Recorder were as follows:—

Messrs. W. & R. Barnett, Ltd. (hereinafter referred to as the appellants) carry on business as grain importers and merchants, having their registered office in Belfast, and their principal place of business in the city. Prior to 1936 there were no adequate or modern facilities for the handling of grain imports at the port of Belfast and the appellants were minded to erect premises which would provide such facilities.

Belfast coastwise trade in grain had fallen from 84,000 tons in 1930 to 13,093 tons in 1937, the decline being mainly due to the better facilities provided by the erection of silos in many cross-channel ports.

By an indenture made the 27th February, 1936, between the Belfast Harbour Commissioners of the one part and the appellants of the other part the Harbour Commissioners demised to the appellants a piece of ground adjacent to the North corner of the Spencer Dock measuring 196 feet by 222 feet. In fulfilment of their covenant in this lease the appellants constructed a transit silo at a cost of approximately £160,000. Further, in pursuance of the liberty so to

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do given in the lease the appellants at their own expense constructed and have maintained on the demised premises and on the portion of the North East Quay of the Spencer Dock and on the portion of the North West Quay of the dock, elevators, gantries and conveyors for the purpose of discharging and transferring cargoes of grain direct from import vessels at the wharf into their silo, or to coastwise vessels.

The procedure is as follows :—The silo is something like a large honeycomb with perpendicular cells or bins. Grain is extracted from the import ship by suction, passes along endless bands on a gantry erected at the edge of the dock, passes through the conveyors into the silo, where it is automatically weighed, raised by elevators to the top and then distributed into bins from which purchasers take delivery. The entire operation is mechanical and the grain is never upon the quay. It passes direct from ship to silo. When grain is being transhipped from the importing vessel to a coasting vessel, it does not enter the silo, but merely passes through an automatic weigher and then into the coasting vessel.

In the year after the erection of the silo Belfast's coastwise trade in grain rose to 39,623 tons due mainly to the facilities provided by this silo. The total quantity of grain received in the silo during the calendar year 1940 was 215,307 tons. This was received ex 44 steamers. The grain so received only remains a short time in the silo. The average time was stated to be 10 to 14 days. The distance from the silo to the wall of the dock is 13 feet 10 inches and this 13 feet 10 inches is not included in the lease. Of the 215,307 tons which came into the silo in 1940—8,695 tons were transhipped to coastwise vessels, 162,220 tons were taken away by motor-lorry, and 37,754 tons were taken by carts, rail and barges.

Prior to September, 1939, the appellants carried on their trade as grain merchants, purchasing grain and shipping it to Belfast and other places and selling to the trade. On 3rd September, 1939, by virtue of the provisions of the Cereals and Cereal Products (Requisition and Control) Order, 1939, S.R. & O. 1939

No. 1035, the appellants were no longer able to continue to trade in grain on their own account and from the date of that order none of the merchandise in the silo premises belonged to the appellants. All the appellants' stocks of grain, whether in silo or afloat were requisitioned and they were not permitted thereafter to buy sell or import grain. Since 4th September, 1939, the use of the premises has been confined entirely to receiving and delivering grain for the Northern Ireland Port Area Grain Committee which is a branch of the Ministry of Food. All grain reaching the premises is received for the account of this Committee and is delivered to millers in accordance with allocations made by the Committee. None of the grain is the property of the appellants. The Committee invoices the grain direct to buyers and collects payment from them. The Committee also pays the appellants for the services, and makes payments for the use of appellants' offices and staff, but definite figures of such payments are not yet settled. The rent payable under the Lease is £1,250.

It was contended on the part of the appellants that the premises should be distinguished as a freight transport hereditament, and by the Commissioner of Valuation contra.

The Recorder held that the premises should not be distinguished as a freight transport hereditament, and refused the appeal.

W. & R. Barnett, Ltd., appealed to the King's Bench Division.

The Divisional Court (Brown and Megaw, JJ.) held that the premises should be distinguished in the valuation lists as a freight transport hereditament.

The appellant appealed.

Chambers, *K.C.*, and *Miller* for the appellant:—

The respondents are merely lessees of a hereditament which was at one time part of a dock. They are not owners or lessees of the water basin, nor of any part of its waters or wharfs; they must show that the undertaking comprises a dock, not merely a part of a

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dock. The Belfast Harbour Commissioners retain possession of the dock and they have full control of all operations connected with it; the Spencer Dock remains part of the undertaking of the Harbour Commissioners. The respondents have the right to use the dock in common with other people, but they have no exclusive right. They have no control over persons using the quay adjacent to their premises. The lease to the respondents does not comprise the land at the water's edge.

We are entitled to refer to the provisions of the Local Government (Rating and Finance) Act (Northern Ireland), 1929, as the preamble to the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, shows that it was enacted in contemplation of the enactment of that Act. It is evident from the Act of 1929 that a freight transport hereditament must be one whose owners can levy freight or other charges; the respondents cannot levy any charges.

It was not intended by the Act of 1929 to afford relief to such people as the respondents, but only to those who suffer by reason of the reduction of their charges.

Warnock, K.C., and *Patton* for the respondents:—

While the hereditament is the thing to be valued, regard must be had to the undertaking of the respondents for the purpose of determining whether or not the hereditament is to be distinguished as a freight transport hereditament. The hereditament in order to come within sec. 6 (1) (*c*) of the Act of 1928, must be occupied and used as part of a dock undertaking, it need not form part of a dock. The rights granted to the respondents under the lease are wide enough to establish that their undertaking comprises a dock within the definition of "dock undertaking" in sec. 6 (3) of the Act of 1928. The respondents have more than a right to use the dock in common with others, they have that right in addition to other rights. A dock comprises land adjoining the water basin. *Mersey Docks and Harbour Board v. West Derby Assessment*

Committee and Bottomley (1). Everything, including the site, the gantries and the suction plant, and the water basin, are all comprised in one unit, the undertaking of the respondents, and are all essential to the carrying on of the undertaking. The decision of the case does not turn on a question of title, use and occupation is the test. The respondents in respect of the Spencer Dock had everything except exclusive user.

Chambers, K.C. (in reply):—

In *Mersey Docks and Harbour Board v. West Derby Assessment Committee* (1), it was pointed out by Greer, L.J., at p. 107, that it had been admitted that the Liverpool Grain Storage and Transit Company was a dock authority.

Cur. ad. vult.

Andrews, L.C.J.: The facts of this case are clearly set out in the Case Stated by the learned Recorder of Belfast, and, accordingly, they need not be detailed at length in this judgment. Messrs. W. & R. Barnett, Ltd. (hereinafter referred to as Messrs. Barnett), feeling themselves aggrieved by the valuation of a certain hereditament described as a grain silo, office, stores and yard, appealed to the Recorder on the twofold grounds:—(1) that the valuation of £1,925 was excessive; and (2) that the premises should be distinguished in the valuation lists as a freight-transport hereditament. At the hearing before the Recorder the appeal on the question of valuation was not proceeded with; and the sole question arising on the case stated is whether the Recorder was right in holding that the premises should not be distinguished as sought in the notice of appeal. The King's Bench Division, being of opinion that his view of the law was not correct, ordered that the order of the Recorder be discharged, and that the Commissioner of Valuation should distinguish the premises as a freight-transport hereditament. From this decision the appeal was

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brought to this Court. The point is a short and purely technical one, but it is admittedly of considerable importance to Messrs. Barnett, who carry on an extensive business as grain importers and merchants in this city.

On 27th February, 1936, Messrs. Barnett, being anxious to obtain more adequate and more modern facilities for the handling of grain imports, obtained a lease of the hereditament referred to from the Belfast Harbour Commissioners for the term of 125 years at the yearly rent of £1,250. The premises, which are delineated and coloured red on a map endorsed on the lease, are described as being "situate adjacent to the "North corner of the Spencer Dock." They are rectangular in shape, 196 feet by 222 feet, and are stated to be bounded on all sides by other property of the Commissioners. In addition to the premises, there were demised to Messrs. Barnett certain rights over adjoining property of the Commissioners including liberty to construct and maintain on the demised premises and on a limited specified area adjoining the dock—(1) elevators and other apparatus for discharging, delivering and loading grain in connection with the grain silo to be built on the premises; and (2) subways and overhead gantries, all such works to be approved in writing by the Commissioners and to cause the least practicable obstruction or inconvenience to the Commissioners, their undertenants and assigns, and to persons and traffic using the quays, roads or property of the Commissioners. The lease contained a covenant by the lessees within three years to expend the sum of £100,000 at least in the erection on the demised premises of a grain silo and store, and a further covenant to pay to the Commissioners all expenditure incurred by them in carrying out the demolition of portion of an existing shed standing partly on the demised premises. The concluding clause in the lease conferred upon the lessees the preferential use of specified portions of the north-east and north-west quays of the Spencer Dock for the loading and discharge of grain in connection with the silo subject to the payment of all rates, dues, tolls and charges and to certain powers of control on the part of the Commissioners.

The silo was duly erected at a cost of £160,000, and elevators, gantries and conveyors were constructed and have since been maintained by Messrs. Barnett at their own expense. The distance from the silo to the nearest part of the wall of the dock is 13 feet 10 inches, and this intervening space of 13 feet 10 inches is not included in the lease.

It was in these circumstances, whilst Messrs. Barnett were carrying on their normal trade, that they brought an appeal before the learned Recorder in December, 1938, judgment being delivered in January, 1939, in which, fixing the valuation at £1,900, the Recorder held that the premises were not a freight-transport hereditament. The grounds of his decision, from which no appeal was taken, will appear more clear when I have referred to the relevant provisions of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, under which certain classes of hereditaments came to be distinguished in valuation lists. It was an Act which by its preamble was passed (amongst other purposes) to make provision "with a view to "the grant of relief from rates" in respect of certain classes of hereditaments, for the distinction in valuation lists of the classes of hereditaments to be affected. Section 1 (1) specifies the three classes of hereditaments to be so distinguished:—(*a*) agricultural hereditaments; (*b*) industrial hereditaments; and (*c*) freight-transport hereditaments. It is with the last class alone that we are concerned in the present case. Such hereditaments are defined in section 6 (1) of the Act. They include hereditaments occupied and used for railway transport purposes, for canal transport purposes, and also by clause (*c*) "a hereditament, "having a net annual value exceeding twenty pounds, "occupied and used wholly or partly for dock purposes." These, however, are only two of the essential conditions to the establishment of a freight-transport hereditament of this character; for by this clause it is also necessary that it should be occupied and used for such purposes "as part of a dock undertaking, "being an undertaking whereof a substantial pro-"portion of the volume of business is concerned with

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"the shipping and unshipping of merchandise not "belonging to or intended for the use of the under-"takers." By these words there appear to me to be prescribed three additional conditions essential for the establishment of such a freight-transport hereditament.

The legislature, with praiseworthy motive, next proceeded in sub-sections (2) and (3) of section 6 to define the meaning of certain of the words and expressions used in this definition section. The first of these relevant to our present enquiry is the term "dock purposes," which, so far as material, are declared to be "all purposes connected with the shipping or "unshipping at a dock of . . . merchandise." This definition, in turn, gives rise to the question what is a dock; and, here again, the sub-section comes to our aid, defining a dock as *including* "any harbour, wharf, "pier, jetty or other works in or at which vessels can "ship or unship merchandise or passengers, not being "a pier or jetty primarily used for recreation."

Pausing for a moment on our enquiry as to the meaning of other terms, it seems to me that the two first-mentioned conditions of a "freight-transport "hereditament" of the character contended for in the present case are satisfied. Its annual value of course far exceeds the statutory minimum of £20; and in my opinion it is "occupied and used wholly or "partly for dock purposes" as it is occupied and used for purposes connected with the shipping or unshipping of merchandise at a dock. The learned Recorder so held in January, 1939, being of opinion that Messrs. Barnett's silo was at least partly so used.

I, accordingly, pass now to the third condition—"as part of a dock undertaking." Here again section 6 (3) provides a definition. Such an undertaking, as I read that definition, means:—(*a*) an undertaking carried on by a dock authority; but it also includes (*b*) any other undertaking (not carried on by a county council or urban district council) comprising as part thereof a dock in so far only as its business is carried on at and in connection with that dock. I take these alternatives separately. The former class of dock

undertaking must be carried on by a dock authority, which our definition section, so far as material, declares to mean "any person or body of persons . . . who are "authorised to construct or are owners or lessees of "any dock authorised by or under any Act." The Belfast Harbour Commissioners, who have a right to charge rates or harbour dues for use of the dock, are such a "dock authority," but not Messrs. Barnett. They are not authorised to construct a dock; neither are they the owners or lessees of a dock. They are at most the lessees of a hereditament which is, or to be more accurate, which at one time (before the erection of the silo) was a part of a dock, with certain preferential and other rights over certain other specified parts of the dock. They never became, and they are not now, either owners or lessees of any portion of that most important part of the dock—the water basin—in this case known as the Spencer Dock; neither are they now, nor have they ever been, owners or lessees of any part of its walls or wharfs. Their only interest in any such portions of the dock is such rights conferred by the lease as I have already mentioned. The possession of these rights, restricted as they are, in character and limited in the area over which they are exerciseable, cannot of course constitute Messrs. Barnett either owners or lessees of the dock. For these reasons the hereditament does not fall within the first limb of the definition of a dock undertaking; and for precisely similar reasons it also fails to come within the second limb, to satisfy which the undertaking must comprise "a dock"—not, as Mr. Chambers pointed out, merely a part of a dock. At the very highest this hereditament only comprises a part of a wharf with rights over another part. It does not embrace even one whole wharf.

For these reasons I agree with the learned Recorder that this statutory requirement to the establishment of a freight-transport hereditament within section 6 (1) (*c*) is not complied with.

I have, as will be observed, arrived at this conclusion entirely on the language of the Act, and in my opinion it does not in any way conflict with the cases cited.

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The most authoritative of these is the decision of the English Court of Appeal upon the corresponding section (s. 5) of the Rating and Valuation (Apportionment) Act, 1928, in *Mersey Docks and Harbour Board v. West Derby Assessment Committee and Bottomley* (1); but the essential distinction between that case and the present is that the occupiers of the hereditaments in the former case—the Mersey Docks and Harbour Board—to whom warehouse No. 5 belonged, were incontestably a dock authority, whilst the owners of Warehouses Nos. 6 and 7—the Liverpool Grain Storage and Transit Co., Ltd.—were admitted for the purposes of the appeals to be a dock authority within the definition (see Judgment of Greer, L.J., at p. 107). Slesser, L.J., makes the same point abundantly clear when he says (at p. 118) that there was no question but that both proprietors of the hereditaments were dock authorities within the definition. The position of both of these bodies was in many material and essential respects different from that of Messrs. Barnett, and doubtless fully justified the admission. In these circumstances the point which was really in issue in these cases was entirely different from that in the present case, involving considerations as to the primary purpose for which the hereditaments were occupied and used, and whether such purpose was or was not connected with the shipping and unshipping of merchandise. The decision on these issues, as appears in the report, turned on the facts found in the cases and the inferences of fact drawn therefrom (see judgments of Scrutton, L.J., at p. 102, and of Greer, L.J., at p. 116).

I have said sufficient in my opinion to justify the decision of the learned Recorder both in January, 1939, and also on the hearing by him of the present appeal; but in case our decision should be brought for review before the House of Lords, I would wish to express my concurrence with the findings of the learned Recorder upon the other requirements of the statute. Indeed, such findings were not questioned in the arguments addressed to us. He was fully justified

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in holding that a substantial proportion of the volume of business of the undertaking was concerned with the shipping and unshipping of merchandise; and, in the altered circumstances consequent upon the making of the Cereals and Cereal Products (Requisition and Control) Order, 1939, the merchandise, namely grain, had ceased (as in January, 1939, he had rightly held it), to belong or to be intended for the use of Messrs. Barnett. Under that Order all such grain was placed at the disposal of the Port Area Grain Committee thereby constituted. It thereby became their property. The argument apparently addressed to the Recorder, but, as he says, "not much pressed"—that the situation created by the Order was abnormal and should not be considered as altering the liability to assessment for rating—was not advanced in our Court, and may be regarded as abandoned.

This exhausts the requirements of a freight-transport hereditament as specified in section 6 (1) (*c*); and I would only add that I agree with the Recorder when he finds that the hereditament is not "primarily "occupied or used for warehousing merchandise not "in the course of being transported," as required by proviso (*b*) to section 7 (3) of the Act.

For the reason which I have stated, namely, that this hereditament is not occupied or used as part of a dock undertaking within the true meaning of that expression as used in the Act, I am of opinion that the premises should not be distinguished in the valuation list as a freight-transport hereditament.

It will be observed that in arriving at this conclusion I have not found it necessary to refer to the provisions of the Local Government (Rating and Finance) Act (Northern Ireland), 1929; but I wish to express my entire concurrence with the view expressed by my colleagues in the judgments which they are about to deliver as to our right to consider the provisions of this latter Act in conjunction with the former in order to resolve any difficulties of construction, and especially of definition, arising upon the earlier Act. The two Acts are so intimately connected with and correlated to one another both in subject-matter and by express

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reference that in my opinion such a course is not only permissible but proper.

The order of the King's Bench Division must be discharged, and the appeal allowed with costs.

BABINGTON, L.J.: The Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, was passed with a view to relieving certain classes of hereditaments in Northern Ireland from rates and it provides for alterations in the valuation lists distinguishing the classes of hereditaments to be affected. One of the classes to be so distinguished and to be given the benefits of derating by subsequent legislation comprises "freight-transport hereditaments," and the statute contains an elaborate series of definitions framed to enable the Commissioner of Valuation to say which hereditaments are and which are not "*Freight-transport Hereditaments.*"

The question for decision in the present case is whether the respondents' hereditament is a "freight-transport hereditament" and so entitled to the benefit of the Local Government (Rating and Finance) Act (Northern Ireland), 1929, by which such hereditaments are relieved of rates.

The facts are set out in the Case Stated and the judgment of the Recorder and I will not recapitulate them further than to say that Messrs. Barnett carry on the business of grain importers on premises leased to them by the Belfast Harbour Commissioners which, before the date of the Lease, were part of the Commissioners' property adjoining the Spencer Dock in which Messrs. Barnett have certain preferential rights. There is a space of 13 feet between these premises and the quay wall and Messrs. Barnett have further rights over this space to enable them to load and unload vessels berthing opposite their premises.

It was urged in argument that the premises were formerly, and still remain, part of the Spencer Dock and are therefore part of a dock undertaking, but the nature of the premises as they now exist must be determined not upon such general considerations but by the definitions contained in the statute, which are to be strictly applied.

"Freight-transport hereditaments" are defined by section 6 of the Act of 1928.

Sub-section (1) provides that "In this Act the "expression 'freight-transport hereditament' means "all or any of the following hereditaments:—

"(*c*) A hereditament having a net annual value "exceeding twenty pounds occupied and "used wholly or partly for dock purposes as "part of a dock undertaking being an under-"taking whereof a substantial proportion of "the volume of business is concerned with "the shipping and unshipping of merchandise "not belonging to or intended for the use of "the undertakers."

It was admitted that since the Port Area Grain Committee took over the respondents' business they no longer import on their own behalf and that their premises are therefore not excluded from the class "freight-transport hereditament" by the latter part of this clause.

The relationship between the respondents and the Port Area Grain Committee was not opened before us and I assume that this admission is correct and that our decision must turn on whether the hereditament is "occupied and used wholly or partly for dock pur-"poses as part of a dock undertaking." That the premises are used partly for dock purposes seems clear though no very definite evidence is to be found in the case stated as to how the appellant's business is carried on, but the premises are certainly not part of a dock undertaking unless the appellant's business is a dock undertaking, because these premises form no part of the Harbour Commissioners' undertaking. All the evidence shows that the Harbour Commissioners' and the respondents' undertakings are independent and that the Commissioners retain possession of the Spencer Dock and wharves and full control of all dock activities, including the right to levy dock charges, subject only to the limited preference in respect of berthage, unloading and transhipment granted to the respondents by their lease. These rights do not in themselves constitute a dock under-

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taking of which the hereditament can be regarded as a part, and therefore the hereditament plus the appurtenant rights over the dock must constitute a "dock undertaking" to bring them within the statute.

I do not base my decision on this point but I am not satisfied that this hereditament, used as it is, together with the appurtenant rights over the Spencer Dock, can be said to be a "dock undertaking"—taking the words as they stand in clause (*c*) without any definition.

But we are not left to decide the nature of this hereditament on the wording of clause (*c*) alone. Sub-section (3) defines "dock undertaking" as meaning "an undertaking carried on by a dock "authority" but also includes any other undertaking *comprising* as part thereof a dock in so far only as its business is carried on at and in connection with that dock. And "dock authority" means any person or body of persons, whether incorporated or not, who are authorised to construct or are owners or lessees of any dock authorised by or under any Act.

The respondents are not a dock authority as they neither constructed nor do they own or lease a dock, and their undertaking does not *comprise* a dock and it therefore is not a dock undertaking nor part of a dock undertaking, and should not be so distinguished in the valuation list.

It is not enough to say that the hereditament is near a dock undertaking or was once part of a dock undertaking. It must be a dock undertaking or part of a dock undertaking in fact at the time the Commissioner of Valuation is called upon to value it and to determine its character.

This disposes of the case but if I had any doubts as to the correct interpretation of this statute, they would be resolved by a perusal of section 3 of the Local Government (Rating and Finance) Act (Northern Ireland), 1929, generally known as the Derating Act, to which Mr. Chambers called our attention.

Section 2 (*b*) of that Act relieved freight-transport undertakings from rates to the extent of 75 per cent., but by the schedule clause (3) (2) it is provided that the undertakers of each dock undertaking shall allow

rebates from the dock charges in respect of certain selected traffics, and provision is made for ascertaining to whom and at what rate these rebates shall be made.

It was argued that the Act of 1928 cannot be construed by reference to provisions in the Act of 1929 but the later Act is supplementary to the earlier one as is shown by their titles and general provisions, and the operative statute is the later one, to which we are entitled to look in the event of any difficulty arising in the construction of the earlier one to see if any light is thrown on its scope and meaning.

And when the clauses in the schedule to the later Act relating to rebates are considered, it is an inescapable conclusion that Parliament in 1929 thought that a freight-transport undertaking must be one which levies freight or other charges, and that the words "dock "undertaking" in the Act of 1928 mean an undertaking which levies dock charges and not an undertaking which derives its income from trading in merchandise in the course of which it not only does not make dock charges but has to pay them either from day to day or by means of a bulk rent which includes dock facilities.

The appeal should be allowed with costs.

Murphy, L.J.

Murphy, L.J.: I concur.

The facts in this case are clearly set out in the case stated and the annexed documents, and the two photographs and Ordnance Survey sheet, by consent handed in by Mr. Warnock, have thrown additional light on the facts so stated.

I desire to acknowledge the very great assistance which I have derived from the arguments of learned counsel on both sides. This appeal is taken by the Commissioner of Valuation seeking to have discharged the Order of the King's Bench Divisional Court (Brown, J., and Megaw, J.), of the 4th July, 1941, whereby an Order of the learned Recorder of the 7th February, 1941, was discharged, and it was ordered that the grain silo and other premises of Messrs. Barnett, situate in Dufferin Road, Belfast, should be dis-

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tinguished in the Valuation List as a freight-transport hereditament.

The learned Judges in the Divisional Court held that these premises (which are comprised in a lease, dated 27th February, 1936, from the Belfast Harbour Commissioners to Messrs. Barnett) came within the terms of section 6 (1) (*c*) of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, to which I shall refer as " the Act of 1928."

It will be convenient to refer first to the argument of Mr. Warnock in support of this decision. He contended that, whilst the hereditament was the thing to be valued, regard must be had to the *undertaking* of Messrs. Barnett and not to the hereditament (or premises) for the purpose of determining whether or not this hereditament was to be distinguished as a freight-transport hereditament; and he submitted that while the hereditament, to come within the words of section 6 (1) (*c*) of the Act of 1928, must be occupied and used as part of a dock undertaking it need not form part of a dock, and indeed need not be near a dock. He referred us to the terms of the lease especially stressing the right to erect " gantries " and moveable suction plant at the side of the " water basin ' of the Spencer Dock, and the preferential rights obtained by Messrs. Barnett as to the use of portions of the north-east and north-west quay of the Spencer Dock, the right to have certain berths in that Dock dredged by the Commissioners, and the right (under certain circumstances) to require the Commissioners to remove other vessels from these berths. He said that Messrs. Barnett did not require the exclusive use of Spencer Dock because the grain trade was necessarily seasonal and they did not require the continuous user of the designated berths.

The rights granted to Messrs. Barnett under this Lease were, he argued, sufficiently wide and comprehensive to enable him to say that the undertaking of Messrs. Barnett does " comprise a dock " within the meaning of these words in the definition of " dock, " undertaking " in section 6 (3) of the Act of 1928. He argued that the site, the gantries and suction plant and the " water-basin," all were comprised in one unit,

namely, the undertaking of Messrs. Barnett, and that they were all interdependent and essential to the carrying-on of the undertaking. In connection with this part of his argument he referred us to the decision of the English Court of Appeal in the *Mersey cases* (1).

As an alternative argument he contended that, at least, part of the demised premises was at the date of the execution of the lease part of the "wharf" of the Spencer Dock and, therefore (having regard to the statutory definition as well as the ordinary interpretation of the words) was part of a dock, and that therefore his clients' undertaking "comprised as part "thereof a dock." This part, he submitted, had not ceased to be a "dock," as Messrs. Barnett were only applying modern methods to the ordinary purposes of unloading ("unshipping") grain ("merchandise") at the dock. It may be observed that, assuming this to be so *qua* Messrs. Barnett, this part would have ceased to be a wharf ("dock") *qua* other would-be users.

As part of his general argument Mr. Warnock submitted that the decision of this case did not turn on "a question of title" but that, as in rating questions, use and occupation was the test, and that, *qua* the Spencer dock, Messrs. Barnett had "everything save "exclusive user." He said that, at worst, his clients' premises were "contiguous to a dock."

I have summarised Mr. Warnock's most interesting arguments, which, however, have not convinced me that the decision of the Divisional Court was correct. In my opinion Mr. Chambers and Mr. Miller have effectually answered all these arguments. The *Mersey cases* (1) differ from the present fundamentally, because in those cases the "granaries" (cases VI. and VII.) were occupied and used by a dock authority, the occupiers (see pages 90, 107 and 118) "being the "lessees of docks and wharves, namely, the Alexandra "Dock and the Coburg Dock in the port of Liverpool," and, as the occupiers in each of the seven cases were dock authorities, the Attorney-General and other counsel who represented the Revenue Officer, confined

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their arguments to the contention that in each case the hereditament was a warehouse, and that, on the facts, when the goods had reached the warehouse the "unshipping" was over. Messrs. Barnett are certainly not "dock authorities" as defined by section 6 (3) of the Act of 1928, and this distinction between the two cases is, in my opinion, fundamental. Furthermore, whatever may have been the character of the premises demised when the lease to Messrs. Barnett was made it could be only said, at best, that a part of a wharf not contiguous to the "water-basin" was leased to them, while the material words in section 6 (3) are "comprising as part thereof *a dock*," a phrase which must, in my opinion, denote the water-basin, or at least a part of the water-basin.

Mr. Miller very forcibly pointed out that the Spencer Dock remained part of the undertaking of the Belfast Harbour Commissioners notwithstanding the lease to Messrs. Barnett, that Messrs. Barnett had no control over persons using the quay (or "wharf") adjacent to their premises, and that any ship which berthed in that portion of the Spencer Dock, in connection with which Messrs. Barnett enjoyed special rights, could only be moved by the Belfast Harbour Commissioners.

I am of opinion that the rights in connection with the Spencer Dock (including its "wharves"), enjoyed by Messrs. Barnett under the lease, although extensive and essential to the conduct of their undertaking, are not sufficient to constitute that undertaking one "comprising as part thereof a dock." These words, I agree with Mr. Chambers, mean that a dock, (a phrase which in its context must, in my opinion, include the "water-basin"), not part of a wharf or rights in connection with the water-basin and wharves, must be included in the parts which make up the whole undertaking, and without attempting to define the exact interest in the dock which would be sufficient to satisfy the words "comprising as part thereof," I am clearly of opinion that neither the nature of the premises (or part of the premises) demised to Messrs. Barnett, nor the rights conferred upon them under the

lease, are sufficient to constitute their undertaking one "comprising as part thereof a dock."

In arriving at this conclusion I have not considered the provisions of the Local Government (Rating and Finance) Act (Northern Ireland), 1929, although I am of opinion that I should be entitled to look to this later statute to explain the intention of the Legislature when it enacted the Act of 1928, if it were necessary to do so. The two Acts are *in pari materia ;* the title of the Act of 1928 shows that it provided for the distinction of certain classes of hereditaments, "with "a view to the grant of relief from rates," divorced from the later statute, the Act of 1928 would be illusory ; the Valuation Lists prepared in accordance with this statute were not to come into operation until the 1st October, 1929, when (see section 8 (1)) the revised valuation lists were "to be in force tor rating "purposes"—see also clause 4 of the Schedule to the Act. The Local Government (Rating and Finance) Act (Northern Ireland), 1929, enacted on the 11th July, 1929, and coming into operation (section 23) on that day, is, as appears from its title : "An Act to "grant complete or partial relief from rates in the "case of hereditaments to which the Rating and "Valuation Apportionment (Northern Ireland) Act "applies," and I do not think that what is said by Greer and Slesser, L.JJ., in the *Mersey cases* (1), on the interpretation of an Act by reference to a subsequent Act, would debar this Court from referring to the Act of 1929 if it were necessary (as I hold it is not) to determine this case by considering the intention of the Legislature in enacting the Act of 1928.

Solicitor for the appellant : *F. C. MacNeice.*
Solicitors for the respondents : *Shean & Dickson.*

J. McC.

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K.B.D.
(Matrimonial)

HUNTER v. HUNTER.

June 13.
July 18.

Matrimonial Causes Act, 1939 (2 & 3 *Geo.* 6, *cap.* 13), *sec.* 19, *ss.* 1, 2—*Desertion by wife—Order for wife's maintenance—Practice in applications for such order.*

The Court may on a decree for divorce, notwithstanding any misconduct on the part of the wife, order that the husband shall secure to her a sum of money, or an annual sum, or may direct the husband to pay to her a weekly or monthly sum.

APPLICATION for an order for maintenance on behalf of a wife, the respondent in proceedings for the dissolution of marriage on the ground of desertion. A decree nisi was made on 26th June, 1940. The respondent applied for the order to the Registrar who referred the application to the judge.

The facts are stated in the judgment.

Sheil for the applicant :—

The Matrimonial Causes Act, 1939, sec. 19, gives complete jurisdiction to make an order for the maintenance of the wife on any decree for divorce whether she is guilty or not.

Copeland for the husband.

Cur. adv. vult.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This is an application on behalf of the respondent for an order for the maintenance of herself and the only child of the marriage—a boy of ten years. The matter was properly brought by notice under Order 70, r. 1 (2) (*b*) and (*e*) before the Registrar, who under the provisions of r. 58 of the Order referred the application to me for decision and directions, as this was the first occasion upon which an unsuccessful wife had made such an application since the passing of the Matrimonial Causes Act (Northern Ireland), 1939.

The petition, which was grounded on the wife's desertion, was heard by me on 26th June, 1940, when,

after hearing the evidence of the parties and of several other witnesses, I pronounced a decree nisi. The parties were married on 18th June, 1930, and took up house together in the following month. Less than three months later the respondent deserted her husband, without, as I held, reasonable excuse; and, notwithstanding the efforts of the magistrates before whom summonses were brought by the respondent for cruelty and threats, the parties were never since reconciled, and they have been living apart from one another for several years, the respondent having the custody of their only child.

It is not surprising to find that this application has been brought, as money was the root cause of the dissension of their married life. It follows upon an application which was made to the Registrar on 6th March, 1940, for alimony *pendente lite*, which was fixed at the rate of £26 per annum.

I have no difficulty in holding that the Court has complete jurisdiction under section 19 (1) and (2) of the Act of 1939 to make an order for the payment by the husband to the wife of monthly or weekly sums for the wife's maintenance. The jurisdiction arises on the making of any decree for divorce or nullity of marriage, and is not confined to a case in which the wife is the successful party. The relevant provisions of section 19 are for all practical purposes in terms identical with section 32 of the Matrimonial Causes Act, 1857, which of course applied only to England, and the provisions of which are now embodied in section 190 of the Judicature Consolidation Act, 1925. The section indicates clearly the considerations which should influence and guide the Court when making such an order: (*a*) The wife's fortune (if any); (*b*) The ability (i.e., the financial ability) of the husband to pay; and (*c*) the conduct of the parties. I find no limitation as to time or otherwise imposed by the section on the Court in its consideration of the conduct of the parties; and it is, therefore, in my opinion not only competent for, but it is the duty of the Court, to take into account the circumstances which were proved at the hearing and upon which the Court

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granted its decree. Thus, the Court would in my opinion act properly in granting relief by way of maintenance to an innocent wife who had been deserted by her husband on a more generous scale than when making a compassionate allowance to a wife who had been found guilty of adultery. So also it would be within the competency of the Court to allow a larger sum to a wife who committed the less serious matrimonial offence of desertion than it would allow to an adultress. The Court's discretion under section 32 of the Act of 1857 was declared by Gorell Barnes, J., in *Ashcroft v. Ashcroft* (1), at p. 273, to be "an entire and "absolute discretion"; and in this he was supported on appeal by Vaughan Williams, L.J., who stated that it was really admitted that under the terms of section 32 the Court has an absolute discretion. In *Robertson v. Robertson* (2), it was submitted by Mr. Inderwick that the practice under the Act of 1857 had not been similar to that of the House of Lords under the old law; and that up to that time permanent alimony for a guilty wife (meaning thereby, presumably, an adultress) had not been ordered except with the consent of the husband or under special circumstances. Thereupon Jessel, M.R., observed that he was sorry to hear it; that he was not giving a final opinion, but it appeared to him that section 32 was intended to give the Court a discretion which was to be exercised according to the circumstances of each case, and that it was not intended that a guilty wife should be turned out into the streets to starve. In his judgment the Master of the Rolls, whilst reserving for future consideration what the terms of the correct rule should be, reiterated his impression as to the Court's "full "discretion" under the section and his opinion that there was no obligation to require special circumstances to be shewn to entitle the guilty wife to some provision. In his short judgment Lindley, L.J., also, I think, clearly favours the same view; and the contention as to the necessity for proof of special circumstances, such as misconduct on the part of the husband, in order to justify the making of any provision for a

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guilty wife was finally rejected in the judgment of Vaughan Williams, L.J., in *Ashcroft v. Ashcroft* (1) (at p. 277), to which I have already referred. In that case the Court of Appeal affirmed the decision of Gorell Barnes, J., who had ordered that the adulterous wife, who was entirely without means of support and unable through ill-health to earn her own living, be paid the weekly sum of £1 under a *dum sola et casta* clause.

For these reasons I hold that either a guilty wife in an adultery suit or a wife who has unsuccessfully defended a desertion petition may in the Court's discretion be awarded maintenance. At the same time I wish to express my opinion that in exercising such discretion in favour of a wife who has been in default it would be contrary to public policy that provision for maintenance should be made on a generous scale. One should rather look at the reasonable proprieties and necessities of the case than proceed by mathematical calculation to award a fixed fraction of the joint income. Any other rule might only encourage the commission by the wife of some form of matrimonial offence which would release her from her marriage vows.

These are the principles which I proceed to apply to the facts of the present case. The husband's income on the basis of £4 0*s.* 3*d.* for a 47 hour week rises with overtime allowances to £7 0*s.* 10*d.* for a 64 hour week; and for the last period made available to me it would appear that his weekly earnings have averaged about £6 16*s.* 6*d.* per week. After making deductions for income tax and other charges he would appear to have left available for his own maintenance and expenses approximately £6 a week—a sum which would be sufficiently large to justify the making of an order for the payment of a substantial weekly sum for the support of his wife and child if the other circumstances of the case so warranted. As I have, however, indicated in a case of this nature it is the Court's duty to look rather at the wife's income than at the husband's to ascertain the extent, if any,

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to which it ought to be supplemented in order to enable her to maintain the necessities and ordinary decencies of life. The evidence on this point is not wholly satisfactory. She is in the employment of the Springfield Factory, Ltd., as a weaver. In her affidavit sworn on 10th February last she stated that she earned on the average about £1 a week. A letter from her employers of 3rd March set out her wages for 12 weeks to the 15th February at various sums which averaged 32*s.* 6*d.* a week. It was explained, however, that these wages covered a period during which the respondent, owing to a shortage of workers, was working at three instead of the normal two looms, but that her employers had then secured a suitable worker for this third loom, so that she would be deprived of the wages accruing therefrom which approximately amounted to 15*s.* 0*d.* a week. Dissatisfied as I was with this evidence as not sufficiently conclusive, when I came to hear the application in the month of June I adjourned the case for further evidence and have now before me a note of her wages from March, 1940, to the end of June, 1941, which is accompanied by a letter of 3rd July from her employers making a precisely similar reference as in the previous letter to her work at the third loom as if this work had continued down to the date of such second letter, but intimating that she would be deprived of the wages accruing therefrom in the future. It is difficult to reconcile these letters of 3rd March and 3rd July upon this point of her continued work at the third loom. This at least, however, appears clear that although her wages for the last two weeks in the list averaged only £1 9*s.* 6*d.* each, those for the previous five weeks amounted in each week to over £2 and averaged over £2 8*s.* 0*d.* a week. This also must be admitted that the statement in her affidavit as to an average wage of £1 a week is false and misleading—a circumstance which I cannot ignore. After careful consideration I have come to the conclusion that, applying the principles which I have enunciated, the facts of the case do not warrant the making of any order for payment of maintenance in her case—even of the

modest sum of 2*s.* 0*d.* a week which was suggested by her counsel, Mr. Sheil.

The case of her son is, however, very different. Section 22 (1) of the 1939 Act provides that in any proceedings for divorce . . . the court may from time to time either before or by or after the final decree make such provision as appears just with respect to the . . . maintenance . . . of the children, the marriage of whose parents is the subject of the proceedings. It is in my opinion the husband's duty to make reasonable provision for the maintenance of this child whose custody he has not sought or obtained. I consider that the amount asked for by Mr. Sheil of 8*s.* 0*d.* a week, or £20 16*s.* 0*d.* a year, is perfectly reasonable for a boy of his age, and I allow this sum as from, say, 1st May last, all arrears, in addition to accruing weekly instalments, to be paid up within three months from this date. I further direct that this sum for maintenance of the boy be varied to £26 a year, or 10*s.* 0*d.* a week, as from 1st January next, and that it shall thereafter continue at that figure until he shall attain the age of 21 years or until further order.

Perhaps I should add a few words in regard to procedure where orders for maintenance are sought. Section 19 (1) provides for the making of orders thereunder "on any decree," and section 22 (1) sanctions the making of orders either "before or by "or after the final decree"; the word "on" has, however, been judicially interpreted in section 32 of the Act of 1857 as meaning "shortly after" or within a reasonable time after the decree. See judgments of Sir J. Hannen (President) in *Bradley v. Bradley* (1), and of Jessel, M.R., in *Robertson v. Robertson* (2). By Order 70, r. 46. an application for maintenance of children may be made by a petitioner at any time after service of a petition and by the respondent after entering an appearance. So also by r. 47 an application for maintenance may be made by the petitioner at any time after the time for entering an appearance to the petition has expired and by a respondent at any time after entering an appearance to the petition,

(1) 3 P.D. 47. (2) 8 P.D. 94.

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but no application shall be made later than one month after final decree except by leave of a judge. It is also provided by section 23 (1) of the Act of 1939 that when a petition for divorce has been presented, proceedings under (amongst other enactments) section 19 of the Act may, subject to and in accordance with rules of court, be commenced at any time after the presentation of the petition. To this section, however, is attached a proviso that no order under any of the enactments (other than an interim order for the payment of alimony under section 19) shall be made unless and until a decree nisi has been pronounced, and any such order, save as therein mentioned, shall not take effect unless and until the decree is made absolute. Accordingly, I am of opinion that proceedings with this object are best left, as in the present case, until after the decree absolute when application for the purpose should be made to the Registrar under rule 1 (2). Sir J. Hannen pointed out in *Bradley v. Bradley* (1), the inconvenience of attempting to determine such matters on the hearing of the petition, and his views I respectfully adopt and endorse. At the same time I feel that I ought to underline the concluding words of rule 47 (1) that no application shall be made thereunder later than one month after final decree except by leave of a judge. It is important that such applications should be made promptly after decree absolute, not only because the facts of the case are fresher in mind than they would be later, but also because it may be very oppressive to make an order for weekly payments of a retrospective character covering several weeks' arrears.

In conclusion I would point out that a respondent seeking maintenance, who has not entered an appearance to the petition, must before making his application to the Registrar under Order 70, rule 1, apply to the Registrar by Summons for leave to enter an appearance.

I shall allow the applicant ten guineas towards the costs of her application.

Solicitors for the applicant: *N. & F. Tughan.*
Solicitors for the husband: *Harper & Co.*

(1) 3 P.D. 47.

J. McC.

[In the House of Lords.]

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Jany. 19, 20, 23. Mar. 4.

Master and servant—Liability of A. for negligence of his servant employed under the control of B.—Negligence—Dangerous object—Petrol—Smoking—Scope of employment.

By a policy of insurance the Respondents were indemnified by the Appellants against loss or damage caused by the use of a certain motor lorry their property.

Under an agreement with H. M. D. the Respondents were bound to deliver petroleum spirit for H. M. D. by lorries which were to be loaded at L. or such other place as H. M. D. should direct, to keep at L. sufficient lorries to transport such spirit, to keep it insured while in transit against fire and spillage, to dress all their employees engaged in such delivery in such uniforms and liveries as H. M. D. might direct, and under the said agreement all employees of the Respondents engaged in such delivery were to accept and obey the orders of H. M. D. or their representatives regarding such delivery, the payment of accounts and all matters incidental thereto, provided that nothing therein contained should be taken as meaning or implying that such employees of the Respondents were in any way the employees of H. M. D., and the Respondents were to be responsible to H. M. D. for all losses which H. M. D. might sustain through any tort, misdemeanour, negligence or default of which any of their employees might be guilty.

On 2nd August, 1937, the lorry, driven by D., received petrol at H. M. D.'s installation at L. for delivery into the storage tank of J. C. D. drove the lorry to J. C.'s garage, inserted the nozzle of the delivery hose into the manhole of J. C.'s tank, turned on the stop-cock, and the petrol began to flow into the tank ; while the petrol was flowing, D. lit a cigarette and threw the match on the floor of the garage. The match ignited some material on the floor and a fire started, causing an explosion which destroyed the lorry, and a motor car and damaged eleven houses.

Differences arose between the parties as to the liability of the Respondents to make good the losses sustained by reason of the

(1) Present : Viscount Simon, L.C., Lord Atkin, Lord Romer and Lord Porter.

(2) The speeches in the House of Lords are printed from the shorthand notes of Messrs. W. B. Gurney, Sons and Funnell.

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damage done to the lorry, the motor car and the houses, and the matters in dispute were referred to arbitration. The arbitrator stated certain questions of law which arose in the course of the reference, in the form of a special case for the determination of the Court.

Held by the House of Lords :—(1) That D. when the accident happened was acting as the servant of the Respondents ; (2) That the act of D. in lighting a cigarette and throwing the match on the floor of the garage amounted in the circumstances, to negligence within the course of his employment, for the consequences of which his master was responsible.

Jefferson v. Derbyshire Farmers, Ltd. ([1921] 2 K.B. 281) approved.

Williams v. Jones (3 H. & C. 602) disapproved.

APPEAL from a decision of His Majesty's Court of Appeal in Northern Ireland (1) reversing a decision of Brown, J.

The facts are stated in the judgment of the Lord Chancellor.

Macaskie, K.C. (of the English Bar) and *Patton* (of the Bar of Northern Ireland) for the Appellants.

Whitaker, K.C., Fox. K.C., and *Curran* (all of the Bar of Northern Ireland), for the Respondents.

VISCOUNT SIMON, L.C.

VISCOUNT SIMON, L.C. : My Lords, in this appeal I should be well content to adopt the unanimous judgments delivered in the Court of Appeal in Northern Ireland, which appear to me to provide a conclusive answer to the argument for the appellants. The material facts giving rise to the litigation are conveniently set out in the judgment of Lord Chief Justice Andrews. They may be summarised as follows :—

The respondents were insured by the appellant Company against liability to third parties arising from damage to property caused by the use by them of a petrol tanker belonging to the respondents. On August 2nd, 1937, this tanker, which was being driven by their employee, one Davison, had taken on board a consignment of 300 gallons of petrol at the Larne Depot of Holmes, Mullin & Dunn, Ltd., for delivery into the storage tank of one Catherwood, a garage

(1) [1941] N.I. 77.

proprietor, of Belfast. Davison drove the tanker to Belfast, backed it into Catherwood's garage, inserted the nozzle of the delivery hosepipe into the manhole of Catherwood's tank and turned on the stopcock at the side of the tanker. While the petrol was flowing from the tanker into the tank, Davison lighted a cigarette and threw away the lighted match. The match ignited some material on the floor of the garage and a fire was caused forthwith where the nozzle of the delivery hose was discharging into the tank. Catherwood seized a fire extinguisher and started to play it on the fire which appeared at the manhole, at the same time shouting to Davison to turn off the stopcock. Davison did not do so, or attempt to do so, but started up the tanker and drove it out of the garage until the fore wheels had about reached the water channel in the street. Davison then stopped the tanker and jumped down to the ground. The fire, although extinguished at the manhole by Catherwood, pursued the trailing hose and the escaping petrol, and Davison had barely reached the ground when a very violent explosion occurred. The explosion destroyed the tanker, the motor car of Catherwood which was parked in the street, and also damaged several houses which were the property of other parties. The claims in respect of the motor and houses were settled for £1,001 16*s.* 7*d.*, which was paid by the appellants without prejudice to their ultimate rights.

One of the grounds on which the appellants resisted the claim of the respondents under the policy was that, in view of the terms of an agreement of October 11th, 1934, between the respondents or their predecessors and Messrs. Holmes, Mullin & Dunn, Ltd., the liability for the damage did not rest upon the respondents at all. By Clause 1 of this agreement the respondents, when requested to do so by Holmes & Company were bound to deliver petroleum spirit which Holmes & Company had for disposal to any destination within Northern Ireland. The delivery was to be by tank lorries at an agreed scale of freights. The lorries were to be loaded at the installation of Holmes & Company at Larne, and the respondents were to keep sufficient

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tank lorries at Larne to transport all the spirit which might be given to them for delivery. The respondents were to keep the spirit, while in transit, insured against fire and spillage and were to dress all their employees engaged in such delivery in such uniforms as Holmes & Company might direct. The respondents undertook to effect all necessary insurances under the Workmen's Compensation Acts and to be accountable to Holmes & Company for the product entrusted to them for delivery. The clause of the agreement mainly relied upon by the appellants as establishing that, at the time of the accident, Davison was the servant, not of the respondents, but of Holmes and Company, is Clause 9. It provided that all the employees of the respondents engaged in or about such delivery should accept and obey the orders of Holmes and Company regarding such delivery, the payments of accounts and all matters incidental thereto, and that the respondents should dismiss any employee disregarding or failing to obey such orders. There followed the proviso that nothing contained in the clause should be taken as implying that such employees were in any way the employees of Holmes and Company.

The dispute was to whether, in these circumstances, the appellants were liable under the policy was referred to the arbitration of Mr. Lowry, K.C., and the learned arbitrator stated his award in the form of a Special Case. Of the questions formulated in the Special Case, only two are now in issue, viz.: (1) Was Davison at the time of the accident acting as the servant of the respondents or of Holmes and Company? (2) Was the admittedly careless act of Davison in lighting a cigarette and throwing the match on the floor of the garage an act done in the course of his employment as such servant, for the consequences of which his master was responsible?

The learned arbitrator himself, subject to the Special Case, answered the first question by saying that Davison was at the time of the accident acting as the servant of the respondents and the second question in the affirmative. Mr. Justice Brown, before whom the Special Case came, was of a different

opinion as regards the first question, and held that Davison was at the relevant moment the servant of Holmes and Company. He agreed with the arbitrator as to the answer to the second question. The Court of Appeal in Northern Ireland (Lord Chief Justice Andrews, Lord Justice Babington and Lord Justice Murphy) unanimously reversed Mr. Justice Brown on the first question and affirmed the answers arrived at by the arbitrator. As I have already indicated, I think that the conclusion reached by the Court of Appeal was right. In view of the full and careful argument presented to this House by Mr. Macaskie, I add the following observations.

Before this House, the appellants limited themselves to arguing the two questions set out above.

As to the first question, no one disputes the proposition that a man may be in the general employment of X and yet at the relevant moment, as the result of arrangements made between X and a third party, may be the servant of the third party so as to make the third party and not X responsible for his negligence. And I agree that the test to be applied is the test formulated by Lord Justice Bowen in *Donovan v. Laing, etc., Syndicate* (1), at page 633, viz., "in whose employment "the man was at the time when the acts complained "of were done, in this sense, that by the employer "is meant the person who has a right at the moment "to control the doing of the act." If it were true that the effect of the written agreement under which the Board's petrol tanker was to carry and deliver Holmes and Company's petroleum spirit to its destination was to lend the vehicle and its driver to Holmes and Company, it might well be that while making delivery at the garage Davison was not acting as the servant of the respondents but as the servant of Holmes and Company. Lord Justice Bowen in *Moore v. Palmer* (2), at page 782, emphasised that "the great test was this, whether the servant was "transferred, or only the use and benefit of his work." But, as Lord Chief Justice Andrews observes, the provisions of the agreement point irresistibly to the

(1) [1893] 1 Q.B. 629. (2) 2 T.L.R. 781.

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conclusion that the agreement was one of carriage and delivery to be performed by the predecessors of the respondents with their own servants: it was not a contract for the hiring out of lorries and men, or of lending them to Holmes and Company to enable them to effect delivery. Clause 9 of the agreement does not, in my opinion, run counter to this view. The provision that the Transport Board's employees shall accept and obey the orders of Holmes and Company regarding delivery means that they shall carry out delivery orders, not that at some moment of the transit and delivery (Mr. Macaskie prefers to fix the moment no later than the time when they take on their load of spirit at Larne) they became servants of Holmes and Company. In truth, the position of the respondents under the contract is not that of people who lend vehicles and drivers for the hirers to direct, but of independent contractors who undertake by the use of their own vehicles and by the activities of their own servants to produce the results, i.e., the deliveries, as ordered by Holmes and Company. The decision of the Court of Appeal, overruling Mr. Justice Brown on this matter, cannot be successfully impeached.

On the second question, every judge who has had to consider the matter in Northern Ireland agrees with the learned arbitrator in holding that Davison's careless act which caused the conflagration and explosion was an act done in the course of his employment. Admittedly he was serving his master when he put the nozzle into the tank and turned on the tap. Admittedly he would be serving his master when he turned off the tap and withdrew the nozzle from the tank. In the interval, spirit was flowing from the tanker to the tank, and this was the very delivery which the respondents were required under their contract to effect. Davison's duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow, and to turn off the tap when the proper quantity had passed from the tanker. In circumstances like these, "they also serve who only "stand and wait." He was presumably close to the apparatus, and his negligence in starting smoking

and in throwing away a lighted match at that moment is plainly negligence in the discharge of the duties upon which he was employed by the respondents. This conclusion is reached on principle and on the evidence, and does not depend upon finding a decided case which closely resembles the present facts. But the decision of the English Court of Appeal, twenty years ago in *Jefferson v. Derbyshire Farmers, Ltd.* (1), provides a very close parallel. As for the majority decision, nearly 60 years before that, of the Exchequer Chamber in *Williams v. Jones* (2), it may be possible to draw distinctions, as the court in *Jefferson's case* (1) sought to do. But this House is free to review the earlier decision, and for my part I prefer the view expressed in that case by the minority, which consisted of Mr. Justice Blackburn and Mr. Justice Mellor. The second question must also be answered adversely to the appellants.

I move that the appeal be dismissed with costs.

I am authorised by my noble and learned friend Lord Romer, who is not able to be present this morning, to say that he concurs in this opinion.

LORD WRIGHT.

LORD WRIGHT: My Lords, the main issue in this case is whether the respondents were liable for the rash and careless act of their lorry driver Davison in striking a match to light his cigarette, and throwing it on the floor of the garage, while he was engaged in the process of transferring from the tank lorry a consignment of petrol into the underground tank at Catherwood's garage at Belfast. The respondents' case is that they were liable, and on this they based their claim to recover under the policy of insurance issued to them by the appellants, Section II of which deals with liability to third parties. There was a separate claim not here material by the respondents for the destruction of their lorry. The questions in debate in regard to the third party liability were (1) whether at the material time Davison was the servant of the respondents or of Holmes, Mullin and

(1) [1921] 2 K.B. 281. (2) 3 H. & C. 602.

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Dunn, Ltd., with whom the respondents had a running contract for the carriage and delivery of petrol in their tank lorries; (2) whether, if Davison was the servant of the respondents, his act in lighting his cigarette was in the circumstances an act of negligence in the course of his employment in the respondents' service, involving the liability of the respondents to compensate the various parties whose property was injured by the explosion which resulted from Davison's rash act, including Catherwood, whose garage was damaged and whose car was destroyed, and the owners of adjoining premises affected by the accident. I am only referring to the claims under Section II of the policy.

The dispute came in the first instance before a learned arbitrator, who stated his award in the form of a Special Case for the opinion of the Court. His own decision on both points was in favour of the respondents. The question thus is whether the arbitrator was, on the facts stated in the award, wrong in law in so deciding. His award was set aside by Mr. Justice Brown on the ground that Davison was the servant of Holmes, Mullin and Dunn, Ltd., at the material time, so that the respondents were not liable for his act. The Judge agreed that, if he was then the servant of the respondents, his act in lighting his cigarette was in the circumstances an act done in the course of his employment. The judgment of Mr. Justice Brown was unanimously reversed by the Court of Appeal, who upheld the arbitrator's award. The appellant company appeals.

My noble and learned friend the Lord Chancellor has fully stated the facts. I agree with his reasoning and conclusions, and I may add with the judgments of the Lord Chief Justice and the Lords Justices. I should be content simply to express my concurrence with the Lord Chief Justice's convincing judgment. I add a few words merely on the two questions of law.

First of all comes the question in whose employment Davison was. This problem and its decision have produced a good many reported cases in the books. In *McCartan v. Belfast Harbour Commissioners* (1),

(1) [1911] 2 I.R. 143.

this House emphatically stated that it is a question of fact how the maxim *respondeat superior* is to be applied in any particular case of this character. The problem is to determine who is the " superior " in the particular instance. Lord Dunedin said categorically that the facts of one case can never rule another case and are only useful so far as similarity of facts (for identity, the word so often used, is really a convenient misnomer) are a help and guide to decision. But all the same, it has been sought to find some general idea, or perhaps mere catchword, which may serve as a clue to solve the problem, and for this purpose the idea or the word " control " has been introduced. Thus Lord Dunedin in *Bain v. Central Vermont Railway Co.* (1), at page 416, quotes the following language of Lord Justice Bowen in *Donovan v. Laing Syndicate* (2), at page 633. " We " have only to consider in whose employment the " man was at the time when the acts complained of " were done, in this sense, that by the employer is " meant the person who has a right at the moment " to control the doing of the act." If that were a complete statement of what Lord Justice Bowen said, I should be driven to question whether it was not too vague and indeterminate to afford any useful guidance. But Lord Justice Bowen did not stop there. Indeed Lord Dunedin merely gives the quotation as the first sentence of what Lord Justice Bowen said. The Lord Chief Justice in the present case quotes the remainder of the passage and this indicates that the word " control " needs explanation and gives some notion of what is necessary before one man's servant become *pro hac vice* the servant of another man. It seems to be assumed in all these cases, no doubt rightly, that the man acquiesces in the temporary change of master, though that may have consequences to him in regard to wages, workmen's compensation, common employment and the like. Lord Justice Bowen completes his statement thus: " There are " two ways in which a contractor may employ his " men and his machines. He may contract to do the " work and, the end being prescribed, the means of

(1) [1921] 2 A.C. 412. (2) [1893] 1 Q.B. 629.

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"arriving at it may be left to him. Or he may contract "in a different manner, and, not doing the work "himself, may place his servants and plant under the "control of another—that is, he may lend them— "and in that case he does not retain control over the "work." It was held on the facts of that case, that the latter description applied. In his judgment in *Moore v. Palmer* (1), Lord Justice Bowen states a more concise criterion: "The test is this, whether the "servant was transferred or only the use and benefit "of his work." Control is not here taken as the test. There are many transactions and relationships in which a person's servant is controlled by another person in the sense that he is required to obey the latter's directions. Such was the case of *Quarman v. Burnett* (2). Its authority has never been questioned. The defendants there were sued for the negligent driving of a coachman employed by a jobmaster, who had contracted with the defendants, who were two ladies, to send horses and a driver for their coach. It is clear that the ladies were intended to direct the times when and the places to and from which they took their drives. That was certainly a measure of control, but what, it was held, was there transferred was the use and benefit of the coachman's work. The coachman did not become the servant of the defendants. Instances of this sort are common. In *McCartan's* case (3) the use and benefit of the Harbour Commissioners' crane and its driver were transferred. The driver of necessity had to obey the directions as to lowering and hoisting given by those conducting the operation, but it was held that there was no transfer of employment. Another illustration is afforded by *Cameron v. Nystrom* (4). The question there was whether stevedores could plead the defence of common employment against a servant of the shipowner whose vessel they were discharging. The plaintiff had been injured by the negligence of one of the shipowner's servants. It was held that there was no common employment because the negligent employee had not

(1) 2 T.L.R. 781.
(2) 6 M. & W. 499.
(3) [1911] 2 I.R. 143.
(4) [1893] A.C. 308.

become the shipowner's servant. No doubt he had in many respects to obey the directions of the shipowners. Lord Herschell, however, thus summed up the position: "There was no express agreement with "regard to the extent to which the master and mate "should have control over them (that is, the stevedore's "servants). That control is only to be implied from "the circumstances in which they were employed. "The relation of stevedore to shipowner is a well-"known relation, involving no doubt the right of the "master of the vessel to control the order in which the "cargo should be discharged, and various other "incidents of the discharge, but in no way putting "the servants of the stevedores so completely under "the control and at the disposition of the master as "to make them the servants of the shipowner, who "neither pays them, nor selects them, nor could "discharge them, nor stands in any other relation to "them than this, that they are the servants of a "contractor employed on behalf of the ship to do a "particular work." Lord Herschell there emphasises that it is the extent of control which is material to be considered. But he also stresses the other elements which make up the relationship of master and servant and which have to be considered before it can be held that there has been a transfer of the man's service from his general employer to the other who is said to be his temporary employer. It is, I think, clear that the presumption is all against there being such a transfer. Most cases can be explained on the basis of there being an understanding that the man is to obey the directions of the person with whom the employer has a contract, so far as is necessary or convenient for the purpose of carrying out the contract. Where that is the position the man who receives directions from the other person does not receive them as a servant of that person, but receives them as servant of his employer. Where the contract is a running contract, for the rendering of certain services over a period of time, the places where, and the times at which, the services are to be performed, being left to the discretion (subject to any contractual limitations)

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of the other contracting party, there must be someone who is to receive the directions as to performance from the other party, and they are given to the employer, whether he receives them personally or by a clerk or by the servant who is actually sent to do the work. That I think is the position here. The contract is of a character very common between the owner of lorries or other vehicles and one who wants to hire them for the conveyance of his goods. In principle the facts here are indistinguishable from those in *Quarman v. Burnett* (1). Davison was subject to the control of Holmes, Mullin and Dunn, Ltd., only so far as was necessary to enable the respondents to carry out their contract. In doing so he remained the respondents' servant. They paid him and alone could dismiss him. Even in acting on the directions of Holmes, Mullin and Dunn, Ltd., he was bound to have regard to paramount directions given by the respondents and was to safeguard their paramount interests. This appears from the course of business followed, and is confirmed by the agreement dated the 11th October, 1934, made between Holmes, Mullin and Dunn, Ltd., and the respondents' predecessor in title, in whose shoes it is admitted that the respondents stand. It is a contract which was intended to remain in force and has remained in force over a period of years, and provided for the carriage of petrol or like products to any destination within Northern Ireland at the request of Holmes, Mullin and Dunn, Ltd. Clause 9 provides that the employees of the respondents or their predecessors engaged in the delivery should accept the orders of Holmes, Mullin and Dunn, Ltd., "regarding such delivery, the payment of accounts "and all matters incidental thereto." These are just the matters in respect of which, for the convenient performance of the contract, the lorrymen employed would naturally be required to obey the wishes of those for whom the petrol was being carried. I do not find anything in the rest of the agreement to lead to any other conclusion. It is not, however, necessary to make any nice examination of its terms. A question

(1) 6 M. & W. 499.

of this sort must be decided on the broad effect of the contract. I do not attach any decisive effect to the proviso to Clause 9 that nothing in the agreement is to be construed to mean that the respondents' employees are to be taken as employees of Holmes, Mullin and Dunn, Ltd., because it could not bind third parties. I think on the whole the agreement goes to support the view that the parties did not contemplate that what the agreement stipulated should involve any transference of servants, as contrasted with transference of service.

Each case of this character must be decided on its particular facts. I therefore do not think it necessary to refer to any other of the cases which have been cited. In the great majority the conclusion has been against the servants being transferred from the general employer. Nor do I consider the cases where a man has been held to have become the servant of someone who was not otherwise his employer, by voluntarily doing work for him.

On the other question, namely, whether Davison's negligence was in the course of his employment, all the decisions below have been against the appellants. I agree with them and need add little.

The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and, at least, generally speaking, not for his employer's benefit. But that last condition is no longer essential to fix liability on the employer (*Lloyd v. Grace Smith and Co.* (1). Nor is such an act *prima facie* negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances under which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to

(1) [1912] A.C. 716.

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LORD WRIGHT.

require either argument or authority. I think what plausibility the contrary argument might seem to possess results from treating the act of lighting the cigarette, in abstraction from the circumstances, as a separate act. This was the line taken by the majority judgment in *Williams v. Jones* (1). But Mr. Justice Mellor and Mr. Justice Blackburn dissented, rightly as I think. I agree also with the decision of the Court of Appeal in *Jefferson v. Derbyshire Farmers, Ltd.* (2), which is in substance on the facts indistinguishable from the present case.

In my judgment the appeal should be dismissed.

LORD PORTER.

LORD PORTER: My Lords, I agree with the speeches just delivered by the noble and learned Lords who have preceded me, and would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: *Berrymans, for G. L. MacLaine & Co., Belfast.*

Solicitors for the respondents: *Blyth, Dutton, Hartley & Blyth, for J. C. W. Rea & Son, Belfast.*

J. McC.

(1) 3 H. & C. 602.

(2) [1921] 2 K.B. 281.

[In the House of Lords.]

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Jany. 13, 14, Mar. 4.

BENSON, APPELLANT;
NORTHERN IRELAND ROAD TRANSPORT BOARD, RESPONDENTS. (2)

Prosecution at Petty Sessions—Dismiss of summons with costs—Right of Appeal to Quarter Sessions—Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 13), sec. 24, sub-sec. 1.

The defendant, who was carrying on a business as a haulier the goodwill of which was of value, was prosecuted at Petty Sessions for breach of the Road and Railway Transport Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 15), sec. 15, sub-sec. 1, by which it is enacted that no person other than the complainants shall use a motor vehicle on any public highway for the carriage of merchandize for hire except with the consent of the complainants and the approval of the Ministry of Home Affairs.

The defendant admitted that he had committed the acts complained of in the summons, but contended that the Act in effect took from him goodwill his property, and in so far as it did so was *ultra vires* of the Parliament of Northern Ireland which by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, cap. 67), sec. 5, sub-sec. 1, is prohibited from making any law so as either directly or indirectly to take any property without compensation. At Petty Sessions the Resident Magistrate dismissed the summons and ordered that the complainants should pay the defendant eight guineas costs. The complainants appealed to the Court of Quarter Sessions.

At the Court of Quarter Sessions the Deputy Recorder of Belfast affirmed the decision of the Resident Magistrate with costs, but stated a case for the opinion of the Supreme Court on the point of law relied on by the defendant. The Case Stated was heard by the Court of Appeal which reversed the order of the Resident Magistrate.

On appeal by the defendant to the House of Lords.

Held, that the order made at Petty Sessions for the payment by the complainants of the defendant's costs not being an order "for payment of any penal or other sum" within the meaning of

(1) Present: Viscount Simon, L.C., Lord Atkin, Lord Wright and Lord Porter.

(2) The report of the speeches in the House of Lords is printed from the shorthand notes of Messrs. Gurney, Sons & Funnell.

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the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 13), sec. 24, sub-sec. 1, no appeal lay against the dismissal of the summons.

APPEAL from a judgment of the Court of Appeal in Northern Ireland (1).

Whitaker, K.C., and *Belford* (both of the Bar of Northern Ireland) for the appellant.

Romer, K.C. (of the English Bar), and *Curran* (of the Bar of Northern Ireland), for the respondents.

MacDermott, A.-G., and *Patton* (both of the Bar of Northern Ireland), for the Government of Northern Ireland.

The House took time for consideration.

VISCOUNT SIMON, L.C.

VISCOUNT SIMON, L.C.: My Lords, this appeal is brought to your Lordships' House from an Order of the Court of Appeal in Northern Ireland which by a majority (Lord Chief Justice Andrews and Lord Justice Murphy, Lord Justice Babington dissenting) arrived at the conclusion that section 15 sub-section (1) of the Road and Railway Transport Act (Northern Ireland), 1935, was not *ultra vires* of the Parliament of Northern Ireland, and that the decision of the Resident Magistrate (Mr. W. F. McCoy, K.C.) dismissing the complaint of the respondent Board against the appellant that the appellant had committed a breach of the section should be reversed.

Sub-section (1) of section 15 of the Act of 1935 provides as follows:—"A person other than the Board "shall not use a motor vehicle on any public highway "for the conveyance of passengers or their luggage or "the carriage of merchandise for hire or reward, "except with the consent in writing of the Board and "the approval of the Ministry of Home Affairs."

Before the Resident Magistrate, the appellant admitted that he had disregarded the prohibition contained in this section, for he had, after the Act

(1) [1940] N.I. 133.

came into force on July 16th, 1935, used a motor vehicle on a public highway for the carriage of merchandise for hire and reward, and he had not received the consent for so doing which is referred to in the section. But he contended that the section was of no effect, on the ground that this section, read in conjunction with section 5 of the Act, was beyond the legislative power of the Parliament of Northern Ireland to enact, in view of the limitations imposed by the Imperial Statute, the Government of Ireland Act, 1920 (10 & 11 Geo. V, c. 67). The material words of section 5 (1) of the Northern Ireland Act are:— "The Board" (i.e., the respondents) "shall, within "a period of six months from the day on which this "Act comes into operation . . . acquire every road "motor undertaking operated for hire or reward in "Northern Ireland," and "In this sub-section the "expression 'operated' means operated immediately "before the passing of this Act and then providing a "road transport service which had been commenced "before the first day of June, 1934." By section 5 of the Imperial Statute it is (amongst other things) provided that the Parliament of Northern Ireland shall not have power to "make a law so as either "directly or indirectly to . . . take any property "without compensation." The appellant had not begun to operate his road motor undertaking until after June 1st, 1934, and therefore received no compensation from the respondent Board. Accordingly he contended that the effect of the Act of 1935 was to "take" property of his, to wit, the goodwill of his business, without compensation. For reasons which will appear, I abstain from any comment on these contentions or on this conception of the meaning of "goodwill."

The Resident Magistrate decided in the appellant's favour and accordingly dismissed the complaint, "on the merits," and ordered that the respondents should pay him eight guineas for costs. Thereupon the respondents gave notice of appeal to the General Sessions of the Peace for the County of the City of Belfast, alleging that they, the complainants in the

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original proceeding, were "aggrieved by the Order of "the Resident Magistrate." When the case came before the Deputy Recorder of Belfast at Quarter Sessions, no one took the objection that, in cases of a criminal nature, where a court of summary jurisdiction has discharged the person summoned and had dismissed the complaint, no appeal lies. The Deputy Recorder heard the appeal out and reached the same conclusion as had the Resident Magistrate on the constitutional point. On a subsequent application, the Deputy Recorder was requested to state a Case under section 26 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935. He did so, and the third of the questions of law raised in the Case Stated is whether he was right in holding "that the decision "of the Resident Magistrate in dismissing the said "summons should be affirmed." The Case Stated came before the Court of Appeal in Northern Ireland, which had the assistance of the Attorney-General as *amicus curiae*. The constitutional question was elaborately argued, but no other matter was raised, and, in the result, the Lord Chief Justice and Lord Justice Murphy held that the impugned section was *intra vires* of the Parliament of Northern Ireland, while Lord Justice Babington took the other view. By its formal Order the Court of Appeal declared "that the said Dismiss should be reversed," and ordered the present appellant to pay costs. The "Dismiss" here referred to must be the Resident Magistrate's dismissal of the complaint, and the reversal of this dismissal must mean that the present appellant was to be convicted. What was to happen then does not appear, but presumably the Court of Appeal's Order means that the present appellant, who had already been discharged by the Resident Magistrate, should be brought before him again, either by summons or, if necessary, by arrest, and should then be fined not more than the maximum of £100 for the offence in respect of which he had been discharged, with the liability of distress of goods in default of payment and the possibility, if the warrant of distress could not be executed, of imprisonment.

Before your Lordships' House the case continued to be conducted as though the only question that could be raised was the constitutional one. After hearing the appellant's counsel and without calling upon the respondent, the House took time to consider how to express its conclusion. In the course of the hearing, the question was put from the House itself to the parties, how it came about that this chain of appeals could be supported, seeing that the appellant in the first instance was discharged by the Resident Magistrate from the complaint on which the whole chain depended. The answer at that time offered to the House was that the Order of the Resident Magistrate requiring the respondent Board to pay to the appellant eight guineas costs was an Order "for payment of a "penal or other sum" within section 24 (1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935.

Section 24 (1), which has taken the place of section 24 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict., c. 93), runs as follows:—"Notwithstanding "anything in any previous enactment, an appeal shall "lie to a court of quarter sessions against an order of "a court of summary jurisdiction, in cases of a civil "nature by either party whether he is the complainant "or defendant, and in other cases by any party against "whom an order is made for payment of any penal "or other sum, or for any term of imprisonment, or "for the estreating of any recognizance to a greater "amount than twenty shillings."

It appeared to your Lordships, when further considering the matter, that this explanation was of very dubious validity. The reversal pronounced by the Court of Appeal was not limited to the order to pay costs: it was essentially an order that the appellant should, after all, be convicted. Moreover, the proposition that it is the imposition of costs on the prosecutor that creates his right to appeal would lead to the extraordinary result that in Northern Ireland, when a court of summary jurisdiction dismisses a criminal charge, the prosecution if dissatisfied, should beg to be ordered to pay costs in order thereby to purchase a

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right of appeal, and the accused, if he wished to make sure of his acquittal, should be astute not to ask for costs against the prosecution. We accordingly asked for further argument as to the right of appeal from the Resident Magistrate and put the case in the list again for that purpose, when the same counsel attended. The House also had the advantage of the aid of the Attorney-General for Northern Ireland.

The upshot is remarkable. There is now no difference of view at your Lordships' Bar, and everybody agrees that there was no right of appeal from the dismissal, with costs of the complaint by the Resident Magistrate. I entirely concur.

Rights to appeal exist only by statute. If there were any right of appeal at any stage in this case, the right must be founded upon something contained in section 24 (1) above quoted.

It cannot be disputed that the alleged breach of section 15 of the Transport Act, for contravention of which a fine of £100 may be imposed, does not constitute a case "of a civil nature": it is a criminal matter. All that remains is to ascertain whether when the prosecutor fails and is ordered to pay costs, this is "an order . . . for payment of any penal or other "sum." This phrase "penal or other sum" is used many times in the Petty Sessions (Ireland) Act, 1851, which is to be read with the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, (see section 65 (2) of the last-named Act and the Interpretation Act, 1889, section 13 sub-section (9)). It is plain that the phrase is abundantly satisfied by provisions for penalties, on the one hand, and by provisions for compensation, damages, amends and the like, on the other. An Order for payment of any penal or other sum is enforced by distress (see section 22, paragraph 2, of the Act of 1851), and by paragraph 9 of the same section an Order for costs "shall be "recoverable in the same manner as any penal or "other sum"—a phrase which at once contradicts the impression that an Order for costs is itself an Order to pay an "other sum." Under the Act of 1851, costs at Petty Sessions were not to exceed twenty

shillings, and since under section 24 of that Act no appeal to Quarter Sessions was permitted if the Order for payment did not exceed twenty shillings, the question whether an unsuccessful prosecutor could found an appeal on an Order requiring him to pay costs could not at that date arise. There is now no limit to the amount of costs that may be ordered (see section 48 (1) of the Act of 1935), but the phrase "recoverable in the same manner as any penal or "other sum" is there repeated and the conclusion that an appeal cannot be founded on an Order making the unsuccessful prosecutor pay costs is reinforced. I have not overlooked the language of the Second Schedule to the Act of 1935, which includes a form of appeal from Petty Sessions and contains in the margin a reference to the dismissal of a complaint with costs. But the reference there must be understood to be to the dismissal of a complaint in cases of a civil nature.

The unchallenged and unchallengeable conclusion thus arrived at is really nothing more than an illustration of an extremely important and universally accepted principle of our law, and a principle which has been recognised again and again by the highest authorities both in England and in Ireland. Thus, in *Regina v. Chairman and Justices of County Tyrone* (1), Lord Chief Baron Palles in granting *certiorari* to quash a conviction for trespassing in pursuit of game, which was pronounced at Quarter Sessions on the hearing of an appeal from Justices who had dismissed the charge, spoke of the "elementary" principle that "an acquittal made by a Court of com-"petent jurisdiction and made within its jurisdiction, "although erroneous in point of fact, cannot as a rule "be questioned or brought before any other Court." The Chief Baron went on to point out that the statute 27 Geo. III., c. 35, which was then being discussed, could not be construed to give an appeal to the prosecutor in a criminal matter, for it contained no clear express words which provided for a departure from the general rule, and he added, "I, therefore, "first rest my view on settled principle, that, before

(1) 40 I.L.T.R. 181.

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"you can appeal against an acquittal, the words must "be clear, express, and free from any ambiguity." The Chief Baron then referred to *Rex v. Middlesex Justices* (1), where a district surveyor claimed the right to appeal against the dismissal of his complaint as being a "person aggrieved." and Lord Ellenborough held that the surveyor was not a "person aggrieved" within the section. The Chief Baron next cited *Rex v. Tucker* (2), where Lord Tenterden said at page 440, "If there be a proceeding by information for a penalty "under a statute, and the Justices, after hearing the "matter, refuse to convict the party, that would be "equivalent to an acquittal, and it is perfectly clear "that no appeal will lie to the Quarter Sessions against "an acquittal."

The broad proposition is summed up in the judgments of Lord Chief Justice Coleridge and Mr. Justice Wills in *Regina v. The London Justices* (3). That case arose under the Highway Act, 1835, which imposes a penalty for wilfully obstructing a highway and provides an appeal to Quarter Sessions by "any person who shall "think himself aggrieved by . . . any order, con- "viction, judgment, or determination made," etc. The decision was that when a summons for wilful obstruction was dismissed by a Justice, the informant had no right to appeal. Lord Coleridge said: "A "person is prosecuted for some breach of the law "which is to be proved in a particular way. The "general principle of law is that, if acquitted, he is "not to be a second time vexed." And he added: "Is a person who cannot succeed in getting a conviction "against another person 'aggrieved'? He may be "annoyed at finding that what he thought was a "breach of law is not a breach of law; but is he "'aggrieved' because someone is held not to have "done wrong?" Mr. Justice Wills said, "Long "before the Highway Act of 1835, there were similar "statutory provisions, and yet no instance can be "found in the books of an appeal successfully prose-

(1) 16 East 310.
(2) 5 Dowl. and Ryland, 434.
(3) 25 Q.B.D. 357.

" cuted, or even attempted to be brought, after an " acquittal."

One other citation may be usefully made from Lord Halsbury's speech in the case of *Cox v. Hakes* (1), where the Lord Chancellor insisted upon the need of express legislation before the right of personal freedom can be made subject to the delay and uncertainty of appeal. Lord Halsbury's pronouncement is not irrelevant to the present case, for the question whether a disappointed prosecutor who is ordered to pay costs has a right of appeal from a magistrate's decision to acquit in Northern Ireland may equally well arise where the punishment on conviction would be imprisonment. Lord Halsbury's language is as follows: " Your Lordships are here determining a question " which goes very far indeed beyond the merits of any " particular case. It is the right of personal freedom " in this country which is in debate; and I for one " should be very slow to believe, except it was done " by express legislation, that the policy of centuries " has been suddenly reversed and that the right of " personal freedom is no longer to be determined " summarily and finally, but is to be subject to the " delay and uncertainty of ordinary litigation, so " that the final determination upon that question " may only be arrived at by the last court of appeal."

In the light of the above pronouncements, very clear statutory language would be needed to establish, by way of exception to the general rule, a right of appeal from a decision dismissing a criminal charge, and nothing contained in section 24 of the Act of 1935 could establish such an exception.

The conclusion that the dismissal of the complaint is final necessarily leads to the view that the whole of the proceedings from the moment that the Resident Magistrate discharged the appellant are misconceived. Neither the Deputy Recorder nor the Court of Appeal in Northern Ireland had any jurisdiction to deal with the matter, and this also applies to the House itself. It is irrelevant to consider whether, after the appellant's discharge, the constitutional issue might have been

(1) 15 A.C. 506 at p. 522.

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raised by Case Stated by the Resident Magistrate, or by using section 51 of the Government of Ireland Act, 1920. The circumstance that no objection on the score that no appeal lay was ever taken at any stage until it was taken by the House itself does not mend matters from the respondents' point of view at all. In *Norwich Corporation v. Norwich Electric Tramways Co., Ltd.* (1), where an objection to the jurisdiction of the High Court was successfully taken in the Court of Appeal, though it had not been raised at an earlier stage, Lord Justice Vaughan Williams laid down the true rule when he said, at page 125, "If the Court in "any case is itself satisfied that it has no jurisdiction "to entertain the application made, it is its duty, in "my opinion, to give effect to that view, taking, if "necessary, the initiative upon itself."

The appeal to this House must be allowed and, inasmuch as the appellant should never have been vexed by proceedings of appeal at all, he must have his costs both before this House and at each stage below.

LORD ATKIN.

LORD ATKIN: My Lords, I entirely agree with the opinion which has just been expressed by my noble and learned friend the Lord Chancellor, and with the motion which has been proposed by him; and inasmuch as we are not differing from the Court of Appeal in Northern Ireland on any point which was argued before them or decided by them, I find it quite unnecessary to add any words of my own.

LORD WRIGHT.

LORD WRIGHT: My Lords, I also agree, and I do not think it necessary to add anything.

LORD PORTER.

LORD PORTER: My Lords, I concur.

Order that the Order of the Resident Magistrate be restored, and that the Respondents do pay to the Appellant his costs here and in the Court of Appeal in Northern Ireland and in the Belfast Recorder's Court, and do repay to the Appellant the costs paid by him

(1) [1906] 2 K.B. 119.

to the Respondents in the Court of Appeal in Northern Ireland and in the Belfast Recorder's Court.

Solicitors for the appellant: *Williams & Tremayne*, for *Wallace Harris & Robb, Belfast.*

Solicitors for the respondents: *Linklaters & Paines*, for *J. Dunville Coates, Belfast.*

Solicitors for the Government of Northern Ireland: *Linklaters & Paines*, for the *Chief Crown Solicitor, Belfast.*

M.W.G.

H.L.(1). 1942.

Jan. 14, 15. March 2.

[In the House of Lords.]

STEELE, APPELLANT;

AND

ROBERT GEORGE & CO. (1937) LIMITED, RESPONDENTS (2).

Workmen's Compensation—Refusal to undergo surgical operation—Right to further compensation—Workmen's Compensation Act (Northern Ireland), 1927 (17 & 18 *Geo.* 5, *c.* 16), *sec.* 9 (1).

The appellant was injured by accident in the course of his employment as a joiner and in consequence suffered pain in standing by reason of which he was totally incapacitated for work. Two eminent surgeons advised him to undergo a certain operation which would make his ankle joint stiff, but which, in their opinion, would, if successful, relieve the pain and enable him to do all the work of a joiner, and if unsuccessful would not make him any more incapacitated for work than he was. The appellant's surgeon was of the opinion that if the operation were successful it would relieve the pain and enable the appellant to do the greater part of the work of a joiner, but that its success was doubtful, and he advised the appellant not to undergo it. The appellant refused to undergo the operation.

On the hearing of an application by the appellant for an award of compensation the Recorder of Belfast held that the operation was one which a man in the appellant's condition might reasonably undergo, that it afforded a reasonable chance of relief from pain and of ability to do some work, and that the alternative was a lifetime of pain and idleness, but that he could not hold the appellant unreasonable in following the advice of a competent surgeon, and he awarded compensation to the appellant.

Held, that the appellant was entitled to compensation.

Decision of the Court of Appeal in Northern Ireland [1941] N.I. 133, reversed.

APPEAL from a decision of the Court of Appeal in Northern Ireland (3), reversing a decision of the Recorder of Belfast.

(1) Present: Viscount Simon, L.C., Lord Atkin, Lord Wright, Lord Romer and Lord Porter.

(2) The speeches in the House of Lords are printed from the shorthand notes of Messrs. W. B. Gurney, Sons & Funnell.

(3) [1941] N.I. 133.

The facts are stated in the opinion of the Lord Chancellor.

Campbell, K.C., and *Agnew* (both of the Bar of Northern Ireland) for the appellant.

Paull, K.C., and *Goldie* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, the Workmen's Compensation Acts do not contain any express provision that the weekly payment during incapacity shall come to an end, or be reduced, if the workman unreasonably refuses to undergo a surgical operation or other medical treatment for the purpose of ending, or diminishing, the incapacity. This ground of relief to the employer is based on the view that if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity "results from the injury" within the meaning of section 9 of the Act of 1925, after the time when the rejected remedy might be confidently expected to bring about a cure. As Lord Justice Fletcher Moulton put it in *Warncken v. Moreland* (1), at page 189, "a workman must behave reasonably, "and if the incapacity, or the continuance of the "incapacity after a certain time, is due to the fact "that he has not behaved reasonably, then the "continuing incapacity is not a consequence of the "accident, but a consequence of his own unreason-"ableness." This view of the matter has been recognised by this House in *Fife Coal Co. v. Cant* (2), and in *Fife Coal Co. v. Fyfe* (3), as well as in many cases in the Court of Appeal in England and in the Court of Session in Scotland. Lord Chief Justice Andrews, in dealing with the present case in the Court of Appeal in Northern Ireland, admirably stated some of the considerations involved as follows: "If the workman refused to submit to an operation "from defect of moral courage or because he is content

(1) [1909] 1 K.B. 184.
(2) [1921] S.C. (H.L.) 15.
(3) [1921] 1 A.C. 329.

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"to put up with the disablement and is willing to "live on a pittance under the Workmen's Compensation "Act, he is not entitled to compensation. To borrow "the language of the Lord Justice-Clerk" (Lord Macdonald) in *Donnelly v. Baird* (1), at page 540, "the workman should do what 'a man of ordinarily "'manly character would undergo for his own good, "'in a case where no question of compensation being "'due by another existed.'"

The principle is therefore established, though I may observe that cases might arise in which there would be some difficulty in working out the quantitative result of applying it. For example, if the proposed operation can at best only work a partial cure, it does not appear to be an easy matter to fix what the reduced figure of compensation should be. And a converse case may be imagined. Supposing that a workman who is partially incapacitated undergoes an operation which is recommended as likely to cure him, but the operation fails and reduces him to total incapacity—is the compensation due from the employer thereby increased?

In the present appeal, however, we are not troubled with these conundrums. The appellant was a joiner, and on February 4th, 1938, while working for the respondents, he fell from a height, landing on his feet on a tiled floor, and as a result his left ankle joint sustained a comminuted fracture which completely incapacitated him. He received weekly payments on this basis until September 3rd, 1940, when the respondents terminated the payments, alleging that his condition thenceforward was due to his unreasonable refusal to undergo a surgical operation.

The burden of proving this allegation rests on the respondents and the question to be determined is a question of fact. The case was heard by the Recorder of Belfast, and the evidence disclosed a conflict in the medical opinions tendered to the disabled appellant. Mr. Irwin, the surgeon who attended him in hospital after the accident and who saw him on many occasions during the next two years, advised an operation,

(1) [1908] S.C. 536; 1 B.W.C.C. 95, 100.

which, by making the injured joint stiff, would relieve the pain suffered from standing and would, as Mr. Irwin confidently expected, give him a "strong stable "limb." Mr. Irwin described the operation as a reasonable one, without extra risk beyond that attending any operation, and one which in his own practice had produced excellent results. Another surgeon, Major Fraser, who had also examined the appellant's injury, confirmed Mr. Irwin's view. The appellant, however, consulted a third surgeon to whom he was sent by his trade union, and this gentleman advised against the operation. Mr. Paull, in his candid and ingenious argument for the respondents, examined the grounds advanced for this adverse opinion with a view to showing that the reasoning of the two experts who advised an operation should be preferred. This, however, is not the immediately relevant issue. The relevant question is whether the appellant was unreasonable in refusing to submit himself to the operation. It may in some cases be quite reasonable for a man to decide not to undergo an operation if his own doctor advises against it, for it is the conclusion reached by his doctor which governs his decision much more than the logic by which his doctor has reached the conclusion. In 1915, Lord Strathclyde, then Lord President of the Court of Session, went so far as to say in *Gracie v. Clyde Spinning Co., Ltd.* (1) that he was prepared to hold "that, save "in very special circumstances, the proximate cause "of incapacity never can be the unreasonable refusal "of a workman to undergo an operation if his own "medical adviser advises him against undergoing "that operation." The Lord President regarded this as the result of the decision in 1903 of the Court of Session in *Sweeney v. Pumpherston Oil Co., Ltd.* (2). It is not necessary to adopt a proposition which goes so far as this, and indeed Lord Chancellor Birkenhead in *Fife Coal Co. v. Cant* (3), at page 22, insisted that in each case the circumstances must be considered and that there was no general rule excusing the work-

(1) 52 S.L.R. 706.
(2) 40 S.L.R. 721.
(3) [1921] S.C. (H.L.) 15.

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man from undergoing a reasonable operation because his medical adviser advised against it. It is enough to say that the question whether the workman is unreasonable in refusing to undergo an operation is a question of fact to be decided by the judge of fact on the evidence, and that where the workman has been advised against the operation by a skilled medical man in whom he has confidence, it would be necessary to bring home to the workman an extremely strong body of expert advice to the contrary before the onus which rests on the employer should be regarded as discharged.

The Recorder considered it to be proved that the operation was one which a man in the appellant's condition might reasonably undergo; it afforded a reasonable chance of relief from pain and of ability to do some work, while the alternative was a lifetime of pain and idleness. But he went on to say, "But "I cannot hold the claimant unreasonable in following "the advice of a competent surgeon in the present "case."

The Court of Appeal has interpreted this last sentence as a ruling in point of law. If the Recorder should be understood as having asserted as matter of law that as long as an injured workman follows the advice of his own doctor in refusing to undergo the operation, the employer's case must fail, whatever the other circumstances are, he would have misdirected himself. But I do not so understand the sentence. The last four words of it show that no abstract doctrine was being enunciated, and when the Recorder said, "I cannot hold," he did not, in my opinion, mean that the law constrained him to decide as he did, but that on a review of all the circumstances of the particular case, he felt unable to decide as a matter of act that the workman had acted unreasonably.

There was evidence to support this conclusion of fact, and it cannot be upset on appeal. If the Recorder as the final judge of fact had decided otherwise, his decision would have been equally unassailable. The appeal must therefore be allowed. I must add that even if the Recorder has been open to correction in

point of law, I do not see how the Court of Appeal could itself properly undertake to determine the question of fact which would then arise: it would still be for the Recorder to decide upon the evidence to what conclusion of fact he himself would arrive.

I move that the appeal be allowed with costs here and in the Court of Appeal.

LORD ATKIN.

LORD ATKIN: My Lords, I agree with the opinion which has just been given by the Lord Chancellor and only add a few words as we are differing from the decision of the Court of Appeal. The appeal turns upon the true view to be taken of the judgment of the learned Recorder on a pure question of fact. The Court of Appeal appear to have considered that the Recorder had found as a fact that the employers had proved that the workman was unreasonable in not submitting to the operation, but had held as a matter of law that the advice of the workman's doctor compelled a decision in his favour. I do not think that such a view does justice to the learned Recorder. It appears to me that he rightly considered all the facts, including the important fact of the advice of the workman's doctor, and came to the conclusion in fact that the employers had not discharged the onus which lay on them to prove that the refusal of the workman to undergo the operation in the circumstances was unreasonable. As that decision was one of fact to support which there was ample evidence it is unassailable. I agree with the proposed motion.

LORD WRIGHT.

LORD WRIGHT: My Lords, the appellant is appealing against an order of the Court of Appeal, discharging an award made by the Recorder of Belfast in favour of the appellant for compensation under the Workmen's Compensation Act. The Court of Appeal held that, though the appellant had received an injury by accident arising out of and in the course of his employment, it had been established to the satisfaction of the Court that he had been unreasonable in refusing to undergo an operation by which the incapacity resulting from the accident might be removed or reduced. The

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Court ordered that the arbitration should stand adjourned with liberty to either party to apply.

The decision of the Court of Appeal presupposes, as I understand it, either that the Recorder has made no finding of fact on the relevant issue, which is whether there has been an unreasonable refusal on the part of the man, or that the finding of fact is unsupported by evidence or involves a misdirection in law and therefore cannot stand. It is clear that the question whether a refusal to undergo an operation in cases of this character, is reasonable or unreasonable is "an absolute matter of fact." as Lord Dunedin said in this House in *Fyfe v. Fife Coal Co.* (1), at page 106. If the arbitrator decided that the refusal was not unreasonable, there is an end of the matter unless there was no evidence to support his finding or he misdirected himself. In the present case, the Recorder's words were: "I cannot hold claimant "unreasonable in following the advice of a competent "surgeon in the present case." The words which precede or follow in the award are merely argumentative. The precise words of decision which I have quoted correctly approach the problem as being one the solution of which depends on the facts of the case. The Recorder expressly limits his decision to the present case. The Recorder also treats the problem as being one in which the precise issue is whether the employers have discharged the burden of proof which rests upon them of showing that the man was unreasonable in his refusal to undergo the operation, and refuses to hold that they have.

That is how I construe the award, and in my opinion the result is that the decision is final. It is not based on any principle as to what does or does not in law constitute unreasonableness in these matters. Indeed I do not see that any legal rule can be stated to determine the decision of the arbitrator. As Lord Birkenhead explained in *Cant v. Fife Coal Co.* (2), the circumstances must be considered in each case. A good many decisions have been reported on this question, but once it is appreciated that the question is one of

(1) [1927] S.C. (H.L.) 103. (2) [1921] S.C. (H.L.) 15.

fact, decisions in other cases are more likely to mislead than to guide, though perhaps sometimes it may help to know what was decided on more or less similar facts.

The rule as to the effect of an unreasonable refusal by a workman to undergo an operation which has been approved by the two decisions of this House which I have quoted, was a piece of judicial legislation adopted by the Court of Appeal as long ago as 1903, but it has not been disavowed or qualified by the Legislature in the subsequent revisions or re-enactments of the Act. It must be taken to have commended itself to the general sense of the community. But it is not easy to understand or apply. It is rather a penalty provision than anything else. I find it not very logical to say that the man's refusal breaks the chain of causality between the accident and the incapacity. On the contrary, effects of the accident still remain. The operation furthermore may not be successful, even if it is not refused. Quite apart from the surgical evidence in the particular case, which may be conflicting, the man's own physical or mental idiosyncrasy cannot in general be excluded. I believe that arbitrators have approached these questions in a humane and liberal spirit, realising that the question cannot be decided save on a sympathetic estimate of the man's personality and the special circumstances of the particular case.

With the greatest respect to the Court of Appeal, I cannot agree with their conclusion. In any event they were not entitled to usurp the function of the Recorder as the judge of fact.

For the reasons stated by my noble and learned friend the Lord Chancellor I concur in the motion proposed.

LORD ROMER.

LORD ROMER (*read by Lord Porter*): My Lords, on the 4th February, 1938, the appellant while in the employment of the respondents was totally incapacitated as the result of a personal injury caused by an accident arising out of and in the course of such employment. He was paid compensation by the respondents on that footing down to the 3rd September,

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1940, when they terminated the payments on the ground that his incapacity (if any) was no longer due to the accident but to his unreasonable refusal to undergo a surgical operation. It appears to have been decided by authorities that are binding on this House that where an incapacitated workman unreasonably refuses to submit himself to an operation which, if successful, would restore his capacity in whole or in part, his right of compensation on the footing of his existing incapacity ceases as from the date on which the capacity might reasonably be expected to have been so restored had the operation been successfully performed.

The question whether in any particular case the workman has unreasonably refused to undergo an operation is purely a question of fact and is therefore one upon which the finding of the arbitrator is conclusive unless there is no evidence upon which his finding can properly be based or unless he has misdirected himself in law. In the present case the arbitrator was the learned Recorder of Belfast, and he plainly decided the question of fact in favour of the appellant. For he said: "I cannot hold claimant "unreasonable in following the advice of a competent "surgeon in the present case," and he made an award in the claimant's favour. It cannot be denied that there was ample evidence on which this finding of fact could be based. The Court of Appeal, however, set aside the award of the arbitrator on the ground that he had misdirected himself in law. Looking at the award as a whole they came to the conclusion that the arbitrator himself was of opinion on the evidence that the appellant was unreasonable in refusing to undergo the operation, but that he, the arbitrator, considered himself bound as a matter of law to decide in the appellant's favour merely by reason of the fact that the appellant's own surgeon had advised against it, and without the arbitrator forming any conclusion as to the weight that ought to be attached to the surgeon's opinion or as to the grounds upon which that opinion was based. The Lord Chief Justice, after referring to the finding

which I cited a few moments ago, said this: "In this "finding, at which he appears to have arrived without "considering the grounds or the sufficiency of the "reasons advanced by the surgeon in support of his "opinion, the learned Recorder was in my opinion in "error on the authorities to which I have referred, "and on this vital issue he accordingly misdirected "himself." Lord Justice Babington said: "As I "read his award the Recorder finds that the applicant "was unreasonable in not submitting to the operation "in fact, but that he was not unreasonable in law "because his refusal was based on the advice of his "own doctor." Lord Justice Murphy, after referring to the opinion of the surgeon in question, said that the Recorder did not appear to have agreed with it, and that in treating that opinion as conclusive on the question of the reasonableness of the applicant the Recorder had misdirected himself.

My Lords, if the Court of Appeal were right in the construction that they put upon the award, they were unquestionably right in allowing the appeal. With all respect to the learned Recorder, it must be confessed that his award is not so clear as could have been wished. I have nevertheless come to the conclusion, after giving it my careful consideration, that it does not bear the meaning attributed to it by the Court of Appeal. A perusal of the judgments of that Court makes it clear that the conclusion to which they came was largely if not wholly based upon a finding in the award that comes a little earlier than the one that I have already cited. It is in these words: "On balance "of evidence I would hold operation one which a man "might reasonably undergo. It affords a reasonable "chance of relief from pain and ability to do some "work, and the alternative is a lifetime of pain and "idleness. There is no other remedy." This was understood by the Court of Appeal to be a finding by the learned Recorder that in his opinion the refusal of the applicant to undergo the operation was unreasonable. I do not so read it. It is no more than a finding that there was nothing unreasonable in asking a man—i.e., any man suffering from the same physical dis-

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abilities as the applicant's—to undergo the operation. Had the finding been the other way there would have been no more to be said; the award would necessarily have been in the appellant's favour. As it was, it was necessary for the arbitrator to go on to consider whether in the particular case before him the appellant's refusal was unreasonable. He held that it was not, and I can find nothing inconsistent in the two findings. Nor can I find in the later of the two findings any indication that the Recorder regarded himself as bound by law to hold that a workman necessarily acted reasonably in refusing an operation merely because his own surgeon advised him to do so. The Recorder was careful to confine his finding to the advice of the "competent surgeon in the present case." I cannot think that he would have described the surgeon as competent if he had considered neither the grounds nor the sufficiency of his opinion, nor would he have added the words "in the present case" if he had been merely intending to state a proposition of law. The surgeon had stated in his evidence that although the operation if successful would prevent lateral movement of the joint, it would if unsuccessful result in there being no movement in the joint at all. I can find no indication in the award that this evidence was not accepted by the Recorder, and, if he did accept it, it is only reasonable to suppose that he took it into consideration in forming an opinion as to the reasonableness or otherwise of the applicant's refusal. With all deference to the Court of Appeal I am unable to agree with them that the Recorder misdirected himself in any way. If he did not, his finding that the applicant was not unreasonable in his refusal must be taken to be conclusive.

For these reasons I would allow the appeal, and I concur in the motion now before the House.

LORD PORTER.

LORD PORTER: My Lords, I agree and have little to add. The only question in the present case as I understand the matter is to determine whether the learned arbitrator was justified in law on the facts found or admitted, in holding that the respondents

had not proved the appellant to have acted unreasonably in refusing to undergo the operation which was suggested.

His main findings were (1) that on a balance of evidence the operation is one which a man might reasonably undergo, but (2) "I cannot hold the "claimant unreasonable in following the advice of a "competent surgeon *in the present case*"—the italics are mine.

If this were all, the respondents' case would be arguable, but it is said that the second finding when read in the light of his other conclusions means, "I cannot hold any claimant, including this one, "unreasonable in any case where he follows the advice "of a competent surgeon. If it were not that I take "this view I should hold him unreasonable." The other findings which are relied upon to support this contention are: (i) "The man seemed more anxious "to establish his right under workmen's compensation "than to get well." (ii) "The operation affords a "reasonable chance of relief from pain and ability to "do some work, and the alternative is a lifetime of "pain and idleness. There is no other remedy."

As to the first of these additional findings, it is said that the true test is laid down in the Court of Session in the judgment of Lord Macdonald in *Donnelly v. Baird* (1), and that where a tribunal has to decide as to the reasonableness or unreasonableness of a workman's attitude in refusing to undergo an operation the questions to be determined are: was there any serious risk, and would a claimant of manly character undergo the operation? In making up his mind it was said the claimant was not entitled to consider that by refusing he would retain his compensation when by consenting he might lose the whole or part of it.

This statement of the law does not, to my mind, mean that wherever a claimant is influenced by the fact that he is receiving compensation he is acting unreasonably in refusing to undergo an operation. Probably no claimant can fail to be moved to some

(1) [1908] S.C. 536.

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extent by such a consideration. Between starvation and an operation involving a serious risk he might well choose the latter, but yet refuse to undergo it where he was in receipt of compensation, and yet not be held unreasonable in doing so. But the overriding consideration must not be the retention of compensation where other circumstances make the refusal to undergo the operation unreasonable. It is true that in the present case the operation is not a serious one, but nevertheless it seems to me impossible to overrule the finding of an arbitrator who comes to the conclusion that the claimant has not been unreasonable in the circumstances in following the advice of a competent surgeon—the circumstances apparently being that the surgeon took the view that if the operation were unsuccessful the workman would be worse than before and that both the man himself and his trade union representative thought that even if it were successful he would be unable to follow his former employment. The witnesses might be wrong in their beliefs yet not unreasonable in holding them and the claimant not unreasonable in acting upon them. It is admitted that the onus of proving that the workman has been unreasonable is upon the employer, and in order to succeed he must, I think, procure a finding of the arbitrator to that effect. It is not enough that there was evidence both ways or even that there was evidence from which a finding might be drawn that the man was unreasonable. In default of such a finding the matter should be referred back to the arbitrator. It could only be decided by a Court of Appeal in favour of the employer if it inevitably followed from the facts found that the workman must in law have been held to be unreasonable.

So far from this being the case in the present instance, there is a finding of fact in favour of the claimant, and in my view no lack of evidence to support it. There are no findings or admitted facts from which it was incumbent upon the arbitrator to find the man unreasonable.

In the course of the argument we have been referred to a number of cases where the workman has or has

not been held to be unreasonable as the case might be. I do not find myself much assisted by them. They seem to turn largely upon the facts of the individual case and upon the findings of the several arbitrators.

My Lords, in arriving at this conclusion I am not conscious of differing from the views of the members of the Court of Appeal in Northern Ireland in any general matter of the law applicable to Workmen's Compensation. I differ only on their construction of the finding of the learned arbitrator. They took him to mean that where the workman followed the advice of his doctor he could never be held to be unreasonable and that in this particular case he would have found the appellant unreasonable had it not been for this view. As I have pointed out, I do not so understand him. I think he took into consideration, as indeed he states, all the circumstances of the case, and having regard to those circumstances I think he had legal grounds for his conclusion. I should allow the appeal.

Appeal allowed with costs in the House of Lords and in the Court of Appeal.

Solicitors for appellant: *Grobel, Son & Co., for Jos. Donnelly & Co., Belfast.*

Solicitors for the respondents: *Bingham & Co., for H. J. Catchpole, Belfast.*

J. McC.

K.B.D. (Probate). 1941.

June 6, 13. July 18.

IN THE GOODS OF JOHN DOHERTY, DECEASED.

Probate—Practice—Grant of administration intestate though will in existence—Non-compliance with citation to lodge Letters of Administration—Form of order.

J. D. died leaving a will by which he appointed three executrices of whom M. M. was the survivor. W. D., one of the children of the deceased man, applied for and obtained a grant of Letters of Administration of the estate as on an intestacy. On the application of M. M. a citation was issued commanding W. D. to bring into the Probate Registry the Letters of Administration and to show cause why they should not be revoked; this citation was not obeyed. M. M. then applied for an Order directing W. D. to lodge the Letters of Administration in the Probate Registry for the purpose of having the grant cancelled.

Andrews, L.C.J., made an order directing W. D. to bring in and lodge the Letters of Administration within a specified time and that in default thereof the applicant should be at liberty to apply for an order for the attachment of W. D.

In the Goods of John Healy (1 N.I.J.R. 77) followed.

APPLICATION for an order of attachment for disobedience to a citation to bring Letters of Administration intestate into the Probate Registry, or for an order revoking the grant of Letters of Administration.

The facts are stated in the judgment.

Stewart for the applicant.

There was no appearance for the respondent.

ANDREWS, L.C.J.

ANDREWS, L.C.J.: This is an application by Margaret McNally, the surviving executrix of an alleged will, dated 2nd June, 1930, of John Doherty, deceased, for an order directing William Archibald Doherty to lodge the Letters of Administration which were granted to him forth of the District Probate Registry at Londonderry, on 26th March, 1934, on the supposition that the said deceased died intestate, for the purpose of having the Grant thereof cancelled.

The deceased in this matter, who died on 25th March, 1933, left three children him surviving, namely,

William Archibald Doherty, Margaret McNally and Mary Ann Doherty, who died on 21st December, 1940.

It is alleged in the affidavits filed in support of this application that the alleged Will of 2nd June, 1930, was drawn for the deceased by one Teady McErlean, and that it was duly executed by the said deceased as a marksman in the presence of the said Teady McErlean and one Agnes R. Lynn, after having been distinctly read over to the deceased who appeared fully to understand it. At the request of the deceased the original will was retained after execution by McErlean, who asserts in his affidavit that he informed William Archibald Doherty both of the existence and of the contents of the will. Notwithstanding this, the latter applied for and obtained the grant of administration intestate, which could only have been made to him on his deposing to the death of the deceased intestate.

By his alleged Will the deceased appointed his daughters Mary Ann Doherty and the applicant, Margaret McNally, to be his executrices, and appointed them also his universal devisees and legatees subject to the payment of three small pecuniary legacies. William Archibald Doherty took no interest whatever in the deceased's property under the alleged Will; but recently he purported as administrator to sell the deceased's farm to one William Francis Doherty, who has been registered as owner thereof, and who has been duly served with notice of this application.

On 10th March, 1941, a citation was issued, on the application of the present applicant, Margaret McNally, as such executrix, commanding the said William Archibald Doherty to bring into and leave in the Principal Registry the said grant of Letters of Administration and further to show cause why same should not be revoked. This citation, which was duly served on 1st April, has since been disobeyed; hence the present application.

Various submissions were made to me on the hearing of the application as to the form of order which in the circumstances it would be proper for me to make. One of these submissions was that an order for attach-

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ANDREWS, L.C.J.

ment should be made against Doherty for disobedience to the citation. Another was that I should make an order revoking the grant of Letters of Administration and declaring that the applicant be granted probate of the alleged Will or given liberty to apply for same; and a supplemental notice of motion claiming this relief (which was irregular in that it was not issued out of the office in accordance with the settled practice of the Court), was served upon William Archibald Doherty, on 10th June. I do not, however, consider that either such form of order would be appropriate at the present stage. In regard to the first of such suggested orders, it is in my opinion more than doubtful if a citation can be regarded as a judgment or order within the terms of Order 41, r. 4, *Evans v. Evans* (1); and further even if it be assumed to be a judgment or order, the citation in the present case was not indorsed with the memorandum prescribed by this rule. As to the second suggested order, whilst it is no doubt competent for the court to revoke a grant which has not been lodged in the Registry, the practice is not to be encouraged, and should in my opinion be reserved for special cases in which such lodgment cannot reasonably be obtained, as, for example, where it has been lost or where the party in possession of it is abroad.

In my opinion the proper procedure to be followed in the present case is that adopted by the Court in *In the Goods of John Healy, deceased* (2), to which my attention has been directed since the hearing. The facts in that case were very similar to the present. The deceased had made a Will. In the year following his death a grant of administration intestate was taken out by one Peter Healy, who a couple of years later lodged the Will in the Principal Registry. A legatee under the Will made frequent applications to Peter Healy to lodge the grant which he had obtained, and a citation had been issued to him to bring in and lodge the same, but he had failed to do so. In these circumstances Andrews J. made an order directing Peter Healy to bring in and lodge the grant within a

(1) 67 L.T. 719. (2) 1 N.I.J.R. 77.

specified time, and in default thereof the applicant to be at liberty to apply for an attachment. He directed that Healy should be served with this order endorsed with the appropriate notice that in default attachment would be applied for. I shall make the same order in the present case; and, as the application has been rendered necessary solely by the conduct of William Archibald Doherty who disobeyed the citation and endeavoured to evade service of the notice of motion, I direct that he pay the applicants' costs thereof, which I measure at ten guineas.

Solicitors for the applicant: *P. J. Agnew & Sons.*

J. McC.

Assize Court, 1942.

DEMPSEY, APPLICANT,

LONDONDERRY CORPORATION, RESPONDENTS.

Jan. 30.
Feb. 5.

Criminal Injury—Compensation for murder of a police constable—"In the execution of his duty"—Criminal Injuries (Ireland) Act, 1919 (9 *Geo.* 5, *c.* 14), *sec.* 1, *sub-sec.* 1 (*a*).

In a claim for compensation under the Criminal Injuries Acts and the Criminal Injuries (Ireland) Act, 1919, for the murder of a police constable in the execution of his duty, it is not necessary to prove that the murder was committed on account of his being, acting or having acted as a police constable.

APPEAL to the Judge of Assize against a decree made by the Recorder of Londonderry awarding compensation for the murder of a police constable, the husband of the applicant, in the execution of his duty.

Chambers, K.C., and *McCall* (for *Nicholson* on war service) for the applicant.

Warnock, K.C., and *McVeigh* for the respondents.

The facts appear in the judgment.

MURPHY, L.J.

MURPHY, L.J.: This is an application for compensation by Winifred Dempsey under section 1 (1) (*a*) of the Criminal Injuries (Ireland) Act, 1919, for the alleged murder of her husband, Head Constable Dempsey.

The learned Recorder of Londonderry awarded compensation (the amount awarded by him is not in dispute), and the Corporation of Londonderry have appealed against this award.

I heard the evidence of the several witnesses at the Assizes in Londonderry, and at the request of Mr. Warnock, to which Mr. Chambers, on behalf of the applicant, agreed, I adjourned the case for legal argument in Belfast.

Before the case was opened in Londonderry, Mr. Warnock informed me that he would apply for case stated, and he renewed this application at the close of his argument in Belfast.

From the evidence it appeared that Head Constable Dempsey had become Senior Head Constable in Londonderry on the retirement of Head Constable Thomas Hueston, on the 31st May, 1940. It was part of the duties of Head Constable Dempsey to visit the constables on the various points throughout the city, and as District Inspector Stratford told me, there were no defined hours for such visits. Constable Corr had been put on protection duty at the Port of Londonderry at his own request by Head Constable Hueston.

I find on the evidence that on the night of the 8th June, 1940, Head Constable Dempsey in the execution of his duty had visited Constable Corr about 9-50 p.m. in the Belfast Steamship Company's shed on the quayside. What then happened was described by Mr. David McLaren :—

David McLaren examined: "Senior Inspector "employed by Ministry of Agriculture in the Port "of Derry in June, 1940. I recall the 8th June, "1940. About 9-50 I was in the Inspection Office "in which I am employed on the Quay and I came "out of it. I went straight into the Belfast S.S. "Company's shed, where I saw Head Constable "Dempsey and Constable Corr in conversation—it "appeared to be friendly. I didn't overhear what "they said. There was a motor launch in front "of the Head Constable and Constable Corr. Head "Constable Dempsey appeared to be pointing to "the motor launch in the course of the conversation. "when all of a sudden Head Constable Dempsey "turned and left in a hurry, walking fast as if to go "off the Quay through the shed. In a matter of "seconds Constable Corr drew his revolver and shot "Head Constable Dempsey, who was at that time "about eight paces from him. Head Constable "Dempsey, after being shot, put his hands above "his head, ran a few paces and then fell to the

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"ground. Constable Corr ran up to where the body "lay and fired more shots into him. Constable "Corr then turned away from the body, came back "about six or eight paces, turned towards the Foyle, "made some sort of signs, placed the revolver in "front of his face and shot himself through the "mouth."

None of the facts as stated by this witness are in dispute and it is therefore clear that Head Constable Dempsey, while he was executing his duty, was killed by shots fired by Constable Corr.

Do these facts bring the case within the words of the sub-section? Mr. Warnock's answer is twofold. He says: (*a*) that "murder" is a term of art in the sub-section, and that this was not a case of murder in the legal sense of that word, because at the time when he shot the Head Constable, Constable Corr was insane, and (*b*) that the words "in the execution of "his duty" do not mean "while on duty," but that the words "on account of" or "because" should be read into this part of the sub-section, that the ratio *decidendi* in *Murphy v. Cork Co. Council* (1), applies, and that, on the evidence, the claim accordingly fails.

In support of his argument that this was not a murder, Mr. Warnock called as witnesses Dr. Crosbie, an eminent member of the medical profession in Londonderry who is Doctor to the Police, and Dr. Watson, the Resident Medical Superintendent of the Londonderry Mental Hospital. Naturally, the professional eminence and *bona fides* of both these witnesses were not questioned by Mr. Chambers. Each witness expressed the opinion that at the time when he shot the Head Constable, Constable Corr was insane. "He was not capable of appreciating the consequences "of the act, and was not capable of appreciating the "difference between right and wrong." "He had a "brainstorm and was insane when he committed the "act." (Dr. Crosbie). "The only conceivable explana- "tion is that he was insane at the time." (Dr. Watson).

Both these witnesses formed their opinions on the facts of the case, and not on any earlier symptoms of

(1) [1903] 2 I.R. 445.

insanity on the part of the constable. Dr. Watson had never examined Constable Corr, and though Dr. Crosbie had known the constable for 10 or 15 years and described him as "heavily built rather plethoric "type about 50 years of age, temperamental type, he "thought a good deal about his health," he (Dr. Crosbie) had only seen him in connection with a sore heel some three weeks or a month before the 8th June, and said that he was a perfectly healthy man organically sound who "had never suffered previously from a "brainstorm." Dr. Crosbie's opinion was that the constable on this night "had a brainstorm and was "insane when he committed the act." There was no sign of an impending brainstorm when he examined the constable's heel, he was then "quite normal." In Dr. Crosbie's opinion the "brainstorm had passed "when he shot himself," and "the fact that he shot "himself is a recognition of the evil he had done."

Dr. Watson admitted in cross-examination that "it is possible that this man" (Constable Corr) "did "appreciate the nature of the act when shooting "Head Constable Dempsey." Dr. Watson stated that he "was influenced by the absence of evidence "of ill-feeling or motive" and that he "considered "the inevitability of discovery."

Objection was made by Mr. Chambers to this medical evidence, and having regard to the fifth question and answer in *Macnaghten's case* (1), the form in which some of the evidence was given was open to legal objection, but as the facts in regard to the shooting were not disputed, I consider that the substance of this evidence was admissible.

The onus was clearly on the Corporation of proving the insanity of Constable Corr at the time of the shooting of the Head Constable. He is presumed to be sane, and could only be held to be insane if at the material time it was clearly proved that he "was "labouring under such a defect of reason from disease "of the mind as not to know the nature and quality "of the act he was doing, or if he did know it, that "he did not know he was doing what was wrong." (Answer to Question 3 in *Macnaghten's case* (1).

(1) 10 Cl. & F. 200, 8 E.R. 718.

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"Uncontrollable impulse" is not recognized as a defence, see *R. v. Kopsch* (1).

I listened with attention to the evidence of both these doctors and, great as is my respect for them, it has entirely failed to satisfy me that at the time when he shot the Head Constable, Constable Corr was insane. The absence of evidence of motive, the place where the crime was committed, and the fact that Corr was a constable in the R.U.C. are in my opinion wholly insufficient to account for a sudden access of insanity in a normal perfectly healthy man of fifty, who was a bit of a hypochondriac but had never manifested previously any trace of incipient insanity. It was not suggested that there was any history of insanity in the constable's family.

It is unnecessary, having regard to my finding on insanity, to consider what effect insanity, if established, would have had—on this I express no opinion.

Mr. Warnock's second line of defence—as to which he has asked me to state a case—depends on the meaning of the words "in the execution of his duty" in section 1 (1) (*a*) of the Act of 1919.

Mr. Warnock in his clear and interesting argument submitted that if these words were merely equivalent to "while on duty." manifest absurdity might result—such as a claim for compensation if one civil servant assassinated another for no apparent reason during working hours. He sought to apply the principle of the decision of the Irish Court of Appeal in *Murphy v. Cork County Council* (2), to this section in the Act of 1919, and argued that, to avoid manifest absurdities, the sub-section must be read as if "on account of "and" or "because of and" should be treated as inserted before the words "in the execution of his "duty."

I cannot agree with this argument. The Act of 1919 was clearly intended to extend the operation of the Criminal Injury Code. The classes of persons enumerated in section 106 are increased by the Act of 1919, and, with full knowledge on the part of the legislature of the construction put on the words "on

(1) 19 Cr. App. R. 50. (2) [1903] 2 I.R. 445.

"account of" in *Murphy's case* (1) (as recognised and applied in *Cremin's case* (2)), *Maguire & Walsh v. Limerick Corporation* (3); and *Rowe v. Cork County Council* (4), no such words are introduced in the first part of the sub-section, where the material words are "in the execution of his duty," while in the second part of the sub-section these words "on account of" *are* inserted, and the two parts of the sub-section are separated by the disjunctive word "or." The distinction between the two classes of cases envisaged by the sub-section is clear, and it could not be successfully contended that these words "on account of" were omitted in the first part of the sub-section *per incuriam.*

The rules laid down in *Heydon's case* (5) (to which Mr. Warnock referred) apply to the exposition of "obscurely penned" statutes or where the terms of a statute are ambiguous, but I cannot see any obscurity or ambiguity in this sub-section. Every statute must be interpreted "principally by the words of the "statute itself, which we are to read in their ordinary "sense" Pollock, C.B.—*Salkeld v. Johnson* (6). When the language of an Act of Parliament is clear and explicit it must receive full effect whatever may be the consequences, and the intention of the Legislature can only be, legitimately, ascertained from what it has chosen to enact either in express words or by reasonable and necessary implication.

When the words of an enactment are clear "it is "useless to enter into an inquiry with regard to the "history of the enactment and any supposed defect "in the former legislation on the subject which it was "intended to cure" (Lord Esher, M.R.—*The Queen v. Bishop of London* (7).

It may be that the present case would afford an argument in favour of an amendment of the Criminal Injury Code, but I must give effect to the Act as I find it.

(1) [1903] 2 I.R. 445.
(2) [1908] 2 I.R. 61.
(3) 42 I.L.T.R. 197.
(4) 51 I.L.T.R. 62.
(5) 3 Co. Rep. 8.
(6) 2 Ex. 256, 272; 154 E.R. at p. 495.
(7) 24 Q.B.D. 224.

Assize Court, 1942.

DEMPSEY, Applicant; LONDONDERRY CORPORATION, Respondents.

MURPHY, L.J.

The appeal in these cases to a Judge of Assize is provided by section 5 (4) of the Local Government (Ireland) Act, 1898, and this sub-section applies (*inter alia*) section 8 of 52 & 53 Vict., c. 48 (The County Court Appeals (Ir.) Act, 1889). Under this section 8 a Judge of Assize . . . may give *special leave* to appeal to the Court of Appeal on a question of law, in which case an appeal may be brought in the prescribed manner to the Court of Appeal.

Under Order LIX, r. 73, such appeals are to be brought on a case stated. The general provisions as to cases stated by Judges of Assize are to be found in section 35 of 27 & 28 Vict., c. 99 (The Civil Bill Courts Procedure Amendment Act (Ir.) 1864), which provided that "It shall be lawful for any Judge of Assize to "direct a special case to be stated . . . in case any "question of law shall arise before him on the trial "of any appeal which in his judgment may be proper "to be decided by a superior Court of Common Law."

In *McQuade v. McQuade* (1881) (1), Palles, L.C.B. (on the construction of a statute) reserved judgment and, having decided what he described as "this "important point raised," refused to state a case. He said: "I cannot state a case on a point in relation "to which I myself have no doubt whatever in my "own mind."

If I had any doubt as to the application of the sub-section to the present case I should gladly accede to Mr. Warnock's request and give special leave to appeal on a case stated, but as I have not the slightest doubt I must give effect to my clear opinion and affirm the award of the learned Recorder with costs of the appeal.

Solicitors for the applicant: *H. C. O'Doherty & Son.*
Solicitor for the respondents: *H. Babington.*

J. McC.

(1) 15 I.L.T.R. 49.

COOKE AND HEYN v. REYNOLDS.

K.B.D. 1942.

Jan. 23. Feb. 13, 20.

Practice—Third Party Procedure—Right of Defendant tort-feasor denying liability to claim contribution from another tort-feasor—Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937 (1 Edw. 8 & 1 Geo. 6, Ch. 9), sec. 16, sub-sec. 1 (c).

In an action for damages for tort in which the defendant denies liability leave may be given to him to serve notice of claim for contribution on a third party under Rules of the Supreme Court, Order 16, r. 48.

The action was brought under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, by the executors of one Francis Plunkett for damages for negligence of the defendant which, it was claimed, caused the death of the testator. The defendant delivered a defence denying negligence and averring that the death was caused by the negligence and breach of statutory duty of the Lord Mayor, Aldermen and Citizens of the City of Belfast, and, by the leave of the Court, the defendant served a third party notice on the Lord Mayor, Aldermen and Citizens of Belfast, claiming to be entitled under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, to contribution from them in respect of any damages recovered in the action, and they entered an appearance.

The defendant applied for directions.

Fox, K.C., and *McSparran* for the defendant:—

Under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, sec. 16, a defendant in an action for tort is in the same position as regards the right to have a third person made a party to the action, as a defendant in an action on a contract, and it is clear that in an action on a contract a defendant can deny liability and bring in a third party under Order 48, Rule 16. *Barclays Bank v. Tom* (1).

(1) [1923] 1 K.B. 223.

K.B.D. 1942.

COOKE AND HEYN v. REYNOLDS.

Chambers, K.C., and *Copeland* for the plaintiff :—

It is only a tort-feasor who is liable in respect of the damage who can recover contribution from another tort-feasor liable in respect of the same damage ; the liability of the defendant must be admitted or established before he can avail himself of the procedure.

[They referred to *Horwell v. London Omnibus Co.* (1).]

Sheil for the Lord Mayor, Aldermen and Citizens of the City of Belfast :—

I associate myself with the arguments of counsel for the plaintiff.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : In this case Mr. Chambers raised an interesting point of practice. The plaintiffs, as executors of one, Francis Le Pan Plunkett, deceased, instituted these proceedings under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act (N.I.), 1937 (hereinafter referred to as " The Act " of 1937 ") for loss and damage consequent upon the death of the deceased resulting, as alleged, from the negligence of the defendant in the driving of a motor car. The defence consists of traverses, together with an averment in paragraph 6 that the loss or damage, if any, was due to the negligence and breach of statutory duty of the Lord Mayor, Aldermen and Citizens of the City of Belfast, upon whom a Third Party Notice had been served pursuant to an Order made by me upon an *ex parte* application on 12th December last.

Mr. Chambers' submission, on behalf of the plaintiffs, was that the right of a tort-feasor to recover contribution from another tort-feasor under sec. 16 (1) (*c*) of the Act of 1937 only arises where the former tort-feasor " is liable " in respect of the damage, and accordingly, that such tort-feasor can only avail himself of the Third Party procedure provided for by Or. XVI., rr. 48-55, when either he has admitted liability in his defence or judgment has been recovered

(1) 2 Ex. D. 365.

against him. Mr. Chambers protests against its being resorted to whilst the defendant's liability on the issue of negligence remains undetermined.

I entirely agree that no tort-feasor can "recover "contribution" until his liability has been established. In this respect the sub-section is clear and specific. It would be absurd and illogical to give a right of contribution to a person whose liability remained in doubt and might never be established. But the sub-section nowhere provides or implies that the necessary preliminaries of third-party procedure cannot be taken before such liability has been determined. Indeed, were it to have done so, the whole benefit of such procedure—the determination of all issues necessary for the ascertainment and apportionment of damages in one trial—would be lost.

In my opinion the present case falls clearly within rule 48 of Order 16, for "the defendant *claims to be* "*entitled* to contribution or indemnity over against a "person not a party to the action." Such a claim is, in my opinion, sufficient to set the machinery of third-party procedure in motion. This has always hitherto been recognised to be the law in the case of contractual liabilities; and the cases to which Mr. Fox referred me such as *Edison and Swan United Electric Light Company v. Holland* (1) (see judgment of Bacon, V.C., at 499), *In re Salmon* (2) (see judgments of Kekewich, J., at p. 359 and of Lord Esher, M.R., at p. 360), and also *Barclays Bank v. Tom* (3) (see judgment of Scrutton, L.J., at pp. 223, 224 and 225), fully recognise the right of a defendant to deny liability and at the same time to avail himself of the third-party procedure. In this way, if he fails in his defence at the trial he is placed in a position without delay or additional expense to establish and enforce the right which he claims to contribution or indemnity from such third party. In my opinion there is no reason why this well established practice should not be applied since the Act of 1937 to actions of tort in the same manner as it has hitherto been applied to actions of contract.

(1) 33 Ch. D. 497.
(2) 42 Ch. D. 351.
(3) [1923] 1 K.B. 221.

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ANDREWS, L.C.J.

In conclusion, I may perhaps be forgiven for saying, as a member of the Rules Committee, that shortly after the passing of the Act of 1937 we considered the matter and came to the conclusion that the existing rules of Order 16 were appropriate and adequate to deal with the case of joint tort-feasors contemplated by sec. 16 (1) (*c*), and, accordingly, we decided not to make any new rules for such purpose under the Act. I have accepted and acted upon this view in other cases without my authority in doing so being questioned. I now unhesitatingly confirm such practice as both convenient and fully justified. I gather from the Annual Practice and the Yearly Practice that this view accords also with the accepted practice in England ; and I am not impressed by Mr. Chambers' argument that such English practice is only sanctioned by the English Order 16A, r. 1 (1) (*c*), the terms of which are not to be found in our corresponding rule 48 of Order 16.

I, accordingly, make an Order that the defendant do on or before 27th February deliver to the Third Party, the Lord Mayor, Aldermen and Citizens of the City of Belfast, a Statement of Claim ; that the said Third Party do on or before 13th March deliver to the defendant their Defence to said claim ; that without leave of the Court no further pleadings be delivered ; that the Third Party be at liberty to appear at the trial of this action and take such part therein as the Judge shall direct ; that such Third Party be bound by the course of the trial and by the judgment in the action ; and that the defendant do serve a copy of his Statement of Claim against the Third Party on the plaintiff.

The defendant by separate Notice of Motion has sought an amendment of his Defence by adding a paragraph, on the authority of *The Corporation of City of Glasgow v. Robertson or Cameron* (1), specifically claiming an indemnity or contribution from the Lord Mayor, Aldermen and Citizens of Belfast. This paragraph I regard as little more than a repetition of paragraph 6 of the Defence in more precise terms ; but

(1) [1936] 2 (1) All. E. R. 173.

it is at least useful in that it contains an express averment of a right to contribution or indemnity. I amend the Defence accordingly.

The two motions will be treated as one, and the costs of all parties will be reserved for the judge at the trial.

Solicitor for the plaintiffs: *A. S. Merrick.*

Solicitor for the defendant: *J. F. Fitzpatrick.*

Solicitor for the Lord Mayor, Aldermen and Citizens of the City of Belfast: *The Town Solicitor.*

J. McC.

K.B.D. 1942.

THE KING (McCONNELL) v. JUSTICES OF BELFAST.

May 4, 15. July 24.

Customs Acts—Prosecution in county in which offence was not committed—Jurisdiction—Implied repeal of statute—Customs Consolidation Act, 1876 (39 & 40 *Vict.*, *c.* 36,), *sec.* 258—*Finance Act*, 1935 (25 & 26 *Geo.* 5, *c.* 24), *sec.* 34 (1).

The Customs Consolidation Act, 1876 (39 & 40 Vict., c. 36), sec. 258, has not been repealed by the Finance Act, 1935 (25 & 26 Geo. 5, c. 24); and accordingly a prosecution brought for an offence against the Customs Acts may be tried in any county in Northern Ireland when the offence is committed in Northern Ireland, in such manner and form as if the offence had been committed in the county in which the prosecution is brought.

APPLICATION to make absolute conditional orders of Certiorari and Mandamus to quash two orders of the Justices of Belfast, by which they held that they had no jurisdiction to hear summonses brought by an officer of Customs against persons living respectively in County Armagh and in County Down, for offences against the Customs Acts committed in those counties.

MacDermott, *A.-G.*, and *Patton* for the complainant :

The question is whether sec. 258 of the Customs Consolidation Act, 1876, has been repealed by sec. 34 of the Finance Act, 1935. The law is correctly stated in *Craies on Statute Law* (3rd ed.) pp. 307, 317 : " the " Court must be satisfied that the two enactments are " so inconsistent or repugnant that they cannot stand " together before they can, from the language of the " later, imply the repeal of an express prior enactment, " i.e., the repeal must, if not express, flow from " necessary implication." " When the Legislature has " given its attention to a separate subject, and made " provision for it, the presumption is that a subsequent " general enactment is not intended to interfere with " the special provision unless it manifests that in- " tention very clearly " *Barker v. Edger* (1). There is no necessary inconsistency between these two sections.

(1) [1898] A.C. 754.

The Finance Act, 1935, expressly repealed certain enactments, if it was intended that sec. 258 of the Customs Consolidation Act, 1876, should be repealed it also would have been expressly repealed. It is said that the fact that it is provided by sec. 34 of the Finance Act, 1935, that the provisions of sec. 257 of the Customs Consolidation Act, 1876, shall not be affected by it, shows that but for such proviso sec. 257 would be repealed, and therefore sec. 258 is repealed, but the answer to that argument is that without such proviso there would have been an inconsistency between the statutes as regards the time within which prosecutions for breach of the Customs Acts must be brought.

[They referred to *Kutner v. Phillips* (1), *Churchwardens of West Ham v. Fourth City Mutual Building Society* (2), *Fox v. Pett* (3), *Flannagan v. Shaw* (4), *Seward v. Owner of the "Vera Cruz"* (5), *Garnett v. Bradley* (6), *Wallwork v. Fielding* (7).

Warnock, K.C., and *Sheil* for the defendants :—

The Finance Act, 1935, sec. 34, applies the Summary Jurisdiction Acts to all summary proceedings notwithstanding any special provisions to the contrary contained in any enactment relating to the revenue under the control of the Commissioners of Customs, except that the time within which Customs prosecutions may be brought remains unchanged. This enactment is inconsistent with sec. 258 of the Customs Consolidation Act, 1876, which is therefore repealed.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This matter came before us on an application to make absolute two Conditional Orders of Certiorari and Mandamus to quash orders and adjudications of the Justices made at Belfast on 23rd March, 1942, on the hearing of two similar complaints at the suit of Robert McConnell, an officer of Customs and Excise, in which John McGivern, of

(1) [1891] 2 Q.B. 267.
(2) [1892] 1 Q.B. 654.
(3) [1918] 2 K.B. 196.
(4) [1920] 3 K.B. 96.
(5) 10 A.C. 59.
(6) 3 A.C. 944.
(7) [1922] 2 K.B. 66.

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ANDREWS, L.C.J.

Banbridge, Co. Down, and Joseph Maguire, of Lurgan, Co. Armagh, were respectively defendants. The summons in each case charged the defendant under section 186 of the Customs Consolidation Act, 1876, with being knowingly concerned in dealing with certain prohibited goods, to wit, forty-five 140 lb. bags of flour, with intent to evade the prohibition applicable thereto. Two other persons, Thomas Gilmore and Alexander Scally, both of Belfast, were also summoned to the same Court in Belfast to answer charges in connection with the same bags of flour. The said summonses came on for hearing together before Major T. Wallace Dickie, R.M., sitting as a Resident Magistrate and Justice of the Peace for the City of Belfast. After the summonses had been opened by the Assistant Chief Crown Solicitor, the solicitors for the defendants John McGivern and Joseph Maguire submitted that the Court had no jurisdiction to hear the said complaints on the ground that their clients lived in Banbridge, County Down, and Lurgan, County Armagh, respectively, where the offences with which they were respectively charged were alleged to have been committed, and that under the provisions of the Summary Jurisdiction Acts (Northern Ireland) the defendants could only be summoned to appear in the Counties in which they respectively resided or in which the said alleged offences were respectively committed. In reply the Assistant Chief Crown Solicitor relied for jurisdiction upon section 258 of the Customs Consolidation Act, 1876, but the Resident Magistrate ruled against him holding that there was "no jurisdiction" in the Court to hear the summonses against the said two defendants. The ground upon which the Conditional Orders were granted was that the Order in each case was made without and in excess of jurisdiction, by which was meant that the Justice was in error in law in holding that he had no jurisdiction.

At common law the venue or place of trial of the offence must be laid where the offence is committed. But statute law has in many cases enlarged the jurisdiction as to venue. Instances of such extension

will be found in *O'Connor's Justice of the Peace,* (1st Edit.), p. 858, one of which is the case of offences against customs, and another the provisions of section 10 of the Petty Sessions Act, 1851 (hereinafter referred to as "the Act of 1851") which confers jurisdiction in regard to venue upon a justice not merely where the offence is committed, but also, in cases in which the offence is committed out of the justices' jurisdiction, if the defendant is within the justices' jurisdiction. Section 42 of this Act, however, provides that nothing in the Act shall extend or be construed to extend to any information or complaint or other proceeding under or by virtue of any of the Acts relating to (amongst other things) Her Majesty's customs, except that all proceedings as to the same may be in the forms of procedure required by the Act or as near thereto as the circumstances of the case will admit.

In these circumstances the Customs Consolidation Act of 1876 (hereinafter referred to as "the Act of 1876") provided by section 258 that any indictment, prosecution, or information which may be instituted or brought under the direction of the Commissioners of Customs for offences against the Customs Acts shall and may be inquired of, examined, tried, and determined in any county of England when the offence is committed in England, and in any county of Scotland when the offence is committed in Scotland, and in any county in Ireland (now of course to be read as Northern Ireland) when the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried.

This section, if still subsisting and unrepealed, creates a jurisdiction which is, of course, quite wide enough to justify the proceedings in this case; but the contention put forward on behalf of the defendant is that in so far as it related to Northern Ireland it was impliedly repealed by section 34 (1) of the Finance Act, 1935 (hereinafter referred to as "the Act of 1935"). This sub-section enacts that the Summary Jurisdiction Acts (Northern Ireland)—which by virtue of section 13 of the Interpretation Act, 1889, and section 34 (4)

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of the Act of 1935 includes the Act of 1851—shall, notwithstanding any special provision to the contrary contained in any enactment relating to His Majesty's revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs and Excise, apply to all informations, complaints and other summary proceedings in Northern Ireland under or by virtue of any such enactment: Provided that nothing in this sub-section shall affect the provisions of section 257 of the Act of 1876 (which relates to the time within which proceedings may be brought). This sub-section is followed by others conferring added powers in such cases upon Resident Magistrates, and finally by the provision in sub-section 5 that "the "enactments set out in Part I. of the Second Schedule "to this Act are hereby repealed to the extent mentioned "in the third Column of that Schedule." Included in such part of the said Schedule is section 42 of the Act of 1851, which I have already referred to as declaring that nothing in the Act should extend to any information or complaint or proceeding under (*inter alia*) the Customs Acts except as regards forms of procedure.

In these circumstances the rival contentions are clear. For the defendant it is submitted that section 34 (1) of the Act of 1935, applying the Summary Jurisdiction Acts (Northern Ireland) to customs cases, limits the justice's jurisdiction in manner set out in section 10 of the Act of 1851, and that this necessarily effects an implied repeal of section 258 of the Act of 1876 which contains what is in some respects a wider and therefore, it is submitted, an inconsistent jurisdiction. In support of this view and as evidence of the wide meaning which the Legislature intended to assign to section 34 (1) reliance is placed upon the proviso to that section without which, it is contended, the time limit for the institution of proceedings provided for by section 257 of the Act of 1876, namely, three years from the commission of the offence, would have been impliedly repealed as being inconsistent with and repugnant to proviso 4 of section 10 of the Act of 1851, by which a time limit of six months would have been imposed. It is contended that the

express provision in the sub-section, that this 257th section shall not be affected by it, indicates that without the proviso the repeal would have been implied; and, that as section 258 is not similarly set up, it must be presumed that the Legislature intended that it should be repealed.

The argument against implied repeal derives its chief support from sub-section (5) already referred to which effects an express repeal of certain provisions of the Acts therein mentioned, but leaves section 258 of the Customs Act untouched. Why, one asks, should the Court be invited, as a consequence of a new enactment, to imply a repeal of a section of one Act of Parliament when Parliament has for the same reason itself effected an express repeal of a section of another Act.

The learned Attorney-General also presented an answer to the argument to which I have referred based on the proviso to section 34 (1) of the Act of 1935—an answer which has gained strength with me the more carefully I have considered it.

Let us consider for a moment what is the principle underlying the doctrine of implied statutory repeal. It may be briefly stated. It is simply that two Acts are so inconsistent or repugnant that they cannot stand together. In such a case the latest expression of the will of Parliament must always prevail, and repeal flows from necessary implication. "*Leges posteriores contrarias abrogant.*" The words which I have used that the two "cannot stand together" are taken from the judgments of A. L. Smith, J., in *Kutner v. Phillips* (1), at p. 272, and in *Churchwardens, etc. of West Ham v. Fourth City Mutual Building Society* (2), at p. 658. They were adopted by Avory, J., in *Fox v. Pett* (3), at p. 204. Shearman, J., in this latter case put the same view concisely when he said: "There cannot be a repeal by implication unless the two statutes are obviously inconsistent." Finally, in *Flannagan v. Shaw* (4), Scrutton, L.J., at page 105, quoted with approval portion of the judgment of A.

(1) [1891] 2 Q.B. 267.
(2) [1892] 1 Q.B. 654.
(3) [1918] 2 K.B. 196.
(4) [1920] 3 K.B. 96.

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L. Smith, J., in *Kutner v. Phillips*, (1) including the words which I have cited above; and, in turn, Warrington, L.J., in *Wallwork v. Fielding* (2), at p. 74, adopted the passage from the judgment of Scrutton, L.J., in *Flannagan v. Shaw* (3). I have not referred to the facts in any of these cases, as, although *Kutner's case* (1) approximates to, yet in none did the facts really closely resemble the present. The important point is the principle which runs through them all.

It is also well established that a repeal by implication is not readily presumed or inferred. It always involves a close scrutiny of the terms of the earlier Act and a careful consideration of their true meaning and effect; for only then is it possible to say definitely whether any real inconsistency exists. Does such inconsistency exist in the present case between section 258 of the Act of 1876 and section 10 of the Act of 1851? The former, so far as is material, provides in effect that proceedings may be brought in any county in Northern Ireland when the offence is committed in Northern Ireland as if it had been committed in the county where it is tried. In those concluding words it appears to me to recognise that the normal jurisdiction is the local venue, but the section as adapted creates, in effect, a sort of artificial county of the whole of Northern Ireland customs area, analogous, as it seems to me, to the county artificially created under a Winter Assize Order. In my opinion there is no necessary repugnancy or inconsistency between such a provision and section 10 which confers a trial jurisdiction where the offence is committed or where the defendant resides. In one respect section 258 is the wider in that when the offence is committed in Northern Ireland proceedings may be brought in a county other than that in which the offence was committed or the defendant resides. On the other hand, section 10 is wider in that it confers a jurisdiction to try a case in any county in Northern Ireland in which the defendant resides even though the offence was committed outside Northern Ireland in any part of the United Kingdom or in any of the

(1) [1891] 2 Q.B. 267.
(2) [1922] 2 K.B. 66.
(3) [1920] 3 K.B. 96.

other places mentioned in the section. Both provisions are affirmative in their character. Thus in my opinion the two jurisdictions are not necessarily inconsistent; rather are they supplemental one of the other, and so able to stand together. My conclusion might well have been different if one of the sections had contained some words by way of limitation which made the jurisdiction conferred by it absolutely exclusive. I cannot illustrate my meaning better than by referring to the fourth proviso of the tenth section of the Act of 1851 in regard to limitation of time within which complaints must be made in all cases of summary jurisdiction. Various periods are specified according to the several classes of offence mentioned, and the section ends with the words "and in any other case "within six months from the time when the cause or "complaint shall have arisen, *but not otherwise.*" I italicise these latter words—"but not otherwise." Between such a provision and section 257 of the Act of 1876 which enables proceedings to be instituted within three years next after the date of the commission of the offence there is a necessary inconsistency and repugnancy. Both cannot stand together. When proceedings must be brought, if at all, within six months one cannot say that they may be brought within three years. This is the answer to the argument advanced to us on behalf of the defendant based on the proviso to section 34 (1) of the Act of 1935 to which I have referred. As I have indicated by reason of the different language of the sections the proviso was necessary to prevent repeal of the three years limitation of time in section 257; but there was no necessity for it in the case of section 258, for, there being no absolute inconsistency, there is no implied repeal.

If I did not consider the matter sufficiently clear I would not have hesitated to look for assistance to the obvious policy of the Act. In this connection I am not, of course, speaking of public policy, which, as Lord Davey said in *Janson v. Driefontein Consolidated Mines, Ltd.* (1), at p. 500, "is always an unsafe and

(1) [1902] A.C. 484.

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"treacherous ground for legal decision." I refer merely to the policy or intention of the Legislature in regard to Customs Law as indicated by the relevant provisions of the Finance Acts, 1934 and 1935. This is in my opinion fully permissible. See *Craies' Statute Law* (4th Edit.) 162-3. As we cast our minds back we recall readily to memory the period of 1934-5, when, as now, Customs offences were rife across the land boundary between Northern Ireland and Eire. In truth, a new problem had arisen in the administration of Customs law. Legislation which was deemed adequate to hold in check smuggling from the Kingdom across the seas required to be strengthened to cope with unauthorised traffic by night as well as by day of uncustomed or prohibited goods across this lengthy land boundary. It was felt that penalties on those who committed offences must be increased, and convictions must be made more easily obtainable by the shifting of onus of proof in cases where certain goods were found within the so-called prescribed area. These amendments were effected by section 16 of the Act of 1934. Procedure also, it was considered, should be simplified, so that technicalities, which sometimes defeated justice, should themselves be overcome. As Customs prosecutions were heard at Petty Sessions what could be more natural than that the well-tried Summary Jurisdiction code, which had been operative for the greater part of a century, should be made applicable. It was with this object that section 34 (1) of the Act of 1935 was passed into law. In these circumstances it would, indeed, be a strange intention to impute to the Legislature that, for no adequate reason which can be suggested, the jurisdiction in regard to venue should be made more limited and restricted, and to this extent a new impediment should be placed in the way of customs prosecutions. The learned Attorney-General pointed out to us in his reply ample subject-matter upon which section 34 (1) of the Act of 1935 could and was doubtless intended to operate wholly apart from the place of trial ; and in the circumstances I must decline to apply the sub-section as we are asked to do in this case so

as to effect an implied repeal of section 258 of the Act of 1876.

Much stress was laid on behalf of the defendant upon the use of the words of section 34 (1) "*notwithstanding any special provisions to the contrary.*" I do not consider, however, that these words advance the defendants' argument any further. In my opinion they refer to a direct statutory conflict, not to some provision which, whilst relating to the same subject-matter, is in certain respects different. In this connection it is of importance to note that section 53 of the English Summary Jurisdiction Act, 1879, and section 11 of the Summary Jurisdiction (Scotland) Act, 1881, contained provisions to the same effect, and for all material purposes in the same terms, as section 34 (1) of the Act of 1934; yet the standard textbook—*Highmore on Customs Laws*—nowhere contains any suggestion that section 258 of the Act of 1876 was impliedly repealed by these Acts for England and Scotland, respectively; and in both editions of *Halsbury's Laws of England* the section is referred to as if still a valid and subsisting enactment. We are told by the learned Attorney-General from official enquiries which he caused to be made that practice in Great Britain conforms to this view; and the practice of upwards of sixty years cannot be ignored.

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For all the reasons stated I am, accordingly, of opinion that the Magistrate was wrong in making the Orders of 23rd March, 1942, that he had no jurisdiction to hear the complaints against John McGivern and Joseph Maguire, respectively, and that the Conditional Orders of Certiorari and Mandamus should now be made absolute in each case with costs.

BROWN, J.: I agree.

BROWN, J.

Solicitor for the complainant: *The Chief Crown Solicitor.*

Solicitor for the defendant: *J. G. Lennon.*

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SWENY v. CARROLL.

July 15.

Civil Authorities (Special Powers) Act (Northern Ireland), 1922 (12 & 13 *Geo.* 5, *c.* 5, *sec.* 3, *sub-s.* 2—*Prosecution by District Inspector of Police—"Authorized in that behalf by the Attorney-General for Northern Ireland"—Sufficiency of general authorisation—Statutory Rules and Orders (Northern Ireland)*, 1940, *No.* 51.

It is not necessary under sec. 3, sub-s. 2, of the Civil Authorities (Special Powers) Act (Northern Ireland), 1922, which provides that an offence against the Regulations made under the Act shall not be prosecuted except by such officer or person as may be authorized in that behalf by the Attorney-General for Northern Ireland, that a separate authority shall be given by the Attorney-General in each particular case; a general authority to prosecute is sufficient.

CASE STATED by the Resident Magistrates sitting at Belfast Petty Sessions, on the hearing of a summons brought by the District Inspector of the Royal Ulster Constabulary who was in charge of the district in which the Court had jurisdiction, for that the defendant failed on demand to produce to a police constable an approved document of identity as required by Regulation 1 (*a*) of the Statutory Rules and Orders made under the Civil Authorities (Special Powers) Act, 1922. By sec. 3, sub-sec. 2 of that Act it is enacted that "an offence against the Regulations shall not be "prosecuted except by such officer or person as may "be authorized in that behalf by the Attorney-General "for Northern Ireland, and in accordance with such "directions as may be given by the said Attorney-"General." The complainant held a Form of Authority given by the Attorney-General for Northern Ireland, authorizing him to prosecute in cases charging an offence under Regulation 1 (*a*) of the said Regulations coming before any Court having jurisdiction in his district. The Resident Magistrates held that it was necessary for the facts relating to each offence against the Regulations to be submitted to and considered by

the Attorney-General before a prosecution against an alleged offender for such offence could be brought, and that the general Authorization given to the complainant was not sufficient, and they dismissed the summons.

MacDermott, *A.-G.*, and *Dougherty* for the complainant :—

This case is covered by authority. In *Tyler v. Ferris* (1), it was held that in a prosecution under the Weights and Measures Act, 1904, which provides that an inspector of weights and measures may prosecute with the consent of the local authority, it is not necessary that a separate consent shall be given in each particular case, and that a general consent to prosecute given to an inspector is sufficient. The decisions in *R. v. Turner* (2), and *Westminster Coaching Services v. Piddleden* (3), are to the same effect. In *Isle of Wight Ferry Co. v. Ryde Commissioners* (4) it was held that in a prosecution under the Nuisances Removal Act, 1855, a general authority to prosecute given by the local authority was held to be insufficient, but that Act expressly required that the order of the local authority should be made "in each particular case."

The defendant appeared in person.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : My colleague and I are in no doubt whatever about this case. We are dealing with a preliminary legal issue as to the sufficiency of a general authorisation given by the Attorney-General to a Police Officer to prosecute in cases of alleged breach of a Regulation which provides for the possession and production to a police constable of documents of identity. The magistrates who heard the case, presumably without having the advantage of a citation of the various authorities which have been opened to us by the Attorney-General, came to the conclusion that the general authorisation for prosecution was insufficient, and that a specific direction must be given by the Attorney-General in each case.

(1) [1906] 1 K.B. 94.
(2) 58 J.P. 320.
(3) 97 J.P. 185.
(4) 25 J.P. 454.

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Regulation 1 (*a*) of the Statutory Rules and Orders (Northern Ireland), 1940, No. 51, made under the powers contained in the Civil Authorities (Special Powers) Act (Northern Ireland), 1922, provides that "on and from such date as may be prescribed by the "Civil Authority every person of fourteen years and "upwards in Northern Ireland shall have in his "possession an approved document of identity, and "shall, on demand, produce the said document to "any police constable in uniform.

"The Civil Authority shall have power to prescribe "from time to time documents which shall be approved "documents of identity for the purposes of this "Regulation.

"Failure to produce an approved document of "identity on demand shall be an offence under the "Regulations."

Section 1 (1) of the Civil Authorities (Special Powers) Act (Northern Ireland), 1922, provides that: "The "civil authority shall have power, in respect of persons, "matters and things within the jurisdiction of the "Government of Northern Ireland, to take all such "steps and issue all such orders as may be necessary "for preserving the peace and maintaining order, "according to and in the execution of this Act and "the regulations contained in the schedule hereto, "or such regulations as may be made in accordance "with the provisions of this Act (which regulations "whether contained in the said schedule or made as "aforesaid, are in this Act referred to as 'the "'regulations')."

The section contains a proviso "that the ordinary "course of law and avocations of life and the enjoy-"ment of property shall be interfered with as little "as may be permitted by the exigencies of the steps "required to be taken under this Act."

I pass to section 3 (1) of this Act which provides that "a person alleged to be guilty of an offence "against the regulations may be tried by a court of "summary jurisdiction constituted in accordance with "this section, and not otherwise."

Section 3 (2) provides that "an offence against the "regulations shall not be prosecuted except by such

" officer or person as may be authorised in that behalf " by the Attorney-General for Northern Ireland, and " in accordance with such directions as may be given " by the said Attorney-General."

It is only with this last sub-section that we are directly concerned in the present case. What is the meaning of the words " such officer or person as may " be authorised in that behalf by the Attorney-General " for Northern Ireland ? " Is an *ad hoc* authorisation necessary in each case ?

Many authorities have been opened to us in which similar words were construed to those with which we are concerned in the present case.

The strongest case in favour of the argument presented by the Attorney-General is *Tyler v. Ferris* (1), in which it was held that it is not necessary under section 14 of the Weights and Measures Act, 1904, (which provides that an inspector of weights and measures may, with the consent of the local authority, prosecute before a court of summary jurisdiction any information arising under the Weights and Measures Acts), that a separate consent shall be given by the local authority in each particular case ; a general consent that a named inspector shall prosecute was held sufficient.

In delivering judgment Lord Alverstone, C.J., said : " In this case an ingenious argument has been raised " by counsel for the respondent founded upon the use " of the word ' consent ' in section 14 of the Weights " and Measures Act, 1904. There have been several " Acts of Parliament allowing local authorities and " other public bodies to authorize their officials to " take proceedings and conduct prosecutions before " justices, and it is argued that because in this Act " it is provided that the inspector may take proceedings " ' with the consent of the local authority,' the use " of the word ' consent ' instead of ' authority ' shows " that the consent must be specially given in each " particular case. I do not agree with that argument. " In my opinion section 14 provides that an inspector " is a person who may conduct prosecutions if the

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"local authority consent to his doing so. If it had "intended that a separate consent was to be given in "each case, I should have expected to find in the Act "a very much clearer expression of that intention. "The case must go back to the justices for them to "convict." Thus it will be observed that the Lord Chief Justice assumed, as indeed the argument of counsel admitted, that had the word "authority" been used instead of the word "consent" there could have been no doubt as to the sufficiency of a general authority.

In *The Isle of Wight Ferry Company v. Ryde Commissioners* (1), it was held that a general authority did not suffice, as by section 5 of the Nuisances Removal Act, 1855, under which proceedings were brought, it was provided that an order of the local authority must be made "in each particular case."

Rex v. Turner (2) decided that in prosecutions for taking game without a licence a general authority given to the supervisor of Inland Revenue for the district by the commissioners was sufficient compliance with the provisions of 53 and 54 Vict., c. 21, s. 27, in which the material words were "authorised . . . in "that behalf," words which are identical with those of section 3 (2) of the Act of 1922, to which I have already referred.

In *Westminster Coaching Services Limited v. Piddlesden* (3), informations against the proprietors of a greyhound racing track and of the motor vehicles used for conveyance of passengers to this track, under the Road Traffic Act, 1930, were signed by a superintendent in the Public Carriage Department of the Metropolitan Police, and by an Assistant Commissioner who held a letter of general authorization to prosecute signed by the Commissioner, and it was held that this constituted a sufficient compliance with section 95 of the Road Traffic Act, 1930, which provided that proceedings for an offence . . . should not be instituted except by or on behalf of the Director of Public Prosecutions or by a person "authorised in

(1) 25 J.P. 454.
(2) 58 J.P. 320.
(3) 97 J.P. 185.

"that behalf" by the persons or bodies therein specified. Here again the material words were identical with those contained in the section with which we are concerned in the present case.

I can well understand that from the purely practical standpoint it would be utterly impossible to have a specific authorization in every case of an offence alleged to have been committed against this regulation dealing with documents of identity; and expediency requires that the authorization should be of a general character.

For the reasons which I have mentioned we hold that the magistrates were wrong in determining that there must be a specific direction in each particular case, and we remit the case to them with a direction to proceed according to law.

BROWN, J. : I concur. BROWN J.

Solicitor for the complainant : *Chief Crown Solicitor.*

J. McC.

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May 4.
July 24.

EMERSON v. WOODS.

Revenue—Customs—Knowingly harbouring prohibited goods—Onus of proof of intention to export—Onus of proof of mens rea—Customs Consolidation Act, 1876 (39 & 40 *Vict., cap.* 36), *sec.* 186—*Import Export and Customs Powers* (*Defence*) *Act*, 1939 (2 & 3 *Geo.* 6, *cap.* 69), *sec.* 3, *sub-ss.* 1, 3.

In proceedings brought by an officer of Customs charging the defendant with knowingly harbouring goods brought to his premises for the purpose of being exported contrary to the Import, Export and Customs Powers (Defence) Act, 1939, section 3, and the Regulations made thereunder, the burden of proving that the goods were brought to the defendants' premises for the purpose of being exported, is on the complainant.

It is also necessary for the complainant in such proceedings to establish the existence of *mens rea* on the part of the defendants.

The words " or other place " in the Import, Export and Customs Powers (Defence) Act, 1939, sec. 3, subs. 1 and 3, are not to be read as applying only to places *ejusdem generis* with " quay."

CASE STATED by the Resident Magistrate at Keady Petty Sessions, on the hearing of a summons brought by an officer of Customs charging the defendant that certain goods were found in his premises which goods were brought to the said premises in Keady for the purpose of being exported contrary to the provisions of the Import, Export and Customs Powers (Defence) Act, 1939, and the Regulations made thereunder, and that the defendant knowingly harboured the said goods with intent to evade the prohibition applicable thereto contrary to section 186 of the Customs Consolidation Act, 1876, and had incurred a penalty of £216 being treble the duty paid value of the goods for which the Commissioners of Customs had elected to sue. The defendant carried on business as a grocer in the premises, and the goods were all of kinds which he regularly bought and sold in the course of that business. Keady is an inland town in which there is no quay.

At the close of the case for the complainant the solicitor for the defendant applied for a dismiss on the ground that there was no evidence that the goods were intended for export, or of *mens rea* on the part of the defendant, and that Keady, having no quay, was not a " place " within sec. 3, sub-s. 3 of the Import, Export and Customs Powers (Defence) Act, 1939, as the words " or other place " in that sub-section must be read *ejusdem generis* with the preceding word " quay." The Resident Magistrate held that by reason of section 3 of the Import, Export and Customs Powers (Defence) Act, 1939, the burden of proving that the goods were not intended to be exported lay upon the defendant, and it was not necessary for the complainant to prove *mens rea* on the part of the defendant; he also held that the words " or other " place " in section 3, sub-s. 1 (*b*) and section 3, sub-s. 3 of the Import, Export and Customs Powers (Defence) Act, 1939, are not to be read as *ejusdem generis* with the word " quay ", and convicted the defendant and ordered him to pay a penalty of £180.

Chambers, K.C., and *Sheil* for the defendant :—

The Import, Export and Customs Powers (Defence) Act, 1939, sec. 3, sub-s. 1 and 3, only applies to these goods if they were brought to the defendant's premises for the purpose of being exported. There is nothing in the Act to throw on the defendant the burden of proving that they were not brought there for that purpose. The complainant must also prove *mens rea* on the part of the defendant. *Frailey v. Charlton* (1). The words " or other place " must be construed *ejusdem generis* with " quay," otherwise the words " quay or other " have no meaning.

MacDermott, A.-G., and *Dougherty* for the complainant.

(1) [1920] 1 K.B. 147.

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EMERSON v. WOODS.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This is an appeal by the defendant by way of Case Stated from the determination of Major McCallum, Resident Magistrate, sitting at Armagh for Keady Petty Sessions, on 27th January, 1942.

The complainant, who is one of H.M. Officers of Customs and Excise, charged the defendant that certain goods were found in his premises, in which he carries on a grocery business, at Market Square, Keady, on 26th September, 1941, which were brought to the said premises for the purpose of being exported contrary to the provisions of the Import, Export and Customs Powers (Defence) Act, 1939, and the regulations made thereunder, whereby the said goods were prohibited goods, and that he knowingly harboured the said goods with intent to evade the prohibition applicable thereto, contrary to section 186 of the Customs Consolidation Act, 1876. It was admitted that the goods in question were on the date of the alleged offence goods the export of which was prohibited except under licence from the Board of Trade.

The Case Stated sets out the evidence with much greater wealth of detail than is requisite. It cannot be made too clear that on the hearing of a Case Stated it is not our province to review the Magistrate's findings of fact on the evidence. On the contrary it is our duty to accept such findings, which should be clearly stated, and merely to express our opinion upon the questions of law arising thereon, which questions should be submitted for our determination in as concise and unambiguous a form as possible. Unfortunately the questions submitted in this case are long and involved, and the first and principal question relates to both *mens rea* and burden of proof—two wholly different matters—which prevents any answer in simple form. In the circumstances I propose to state the questions which appear to me to arise in the case stated, and upon which this Court should express its opinion. These questions are as follows :—

1. Whether in proceedings under section 186 of the Customs Consolidation Act, 1876, for the recovery of penalties for knowingly harbouring

prohibited goods and having regard to section 3 (3) of the Import, Export and Customs Powers (Defence) Act, 1939, the burden of proof that the goods were intended for export still lies on the complainant ?

2. Whether in such proceedings it is now necessary for the complainant to establish the existence of *mens rea* upon the part of the defendant ?
3. Whether the words " or other place " in section 3 (1) (*b*) and section 3 (3) of the Act of 1939 should be read *ejusdem generis* with the word " quay " ?

To understand the true meaning and effect of section 3 of the Act of 1939 I find it advantageous to consider in the first place the general scope and framework of the Act of 1876. It was designed primarily with the object of ensuring the due collection of the Customs Revenue, but it also forms the basis of prohibitions and restrictions on import and export. After providing for the appointment of officers and other matters incidental thereto, the Act contains provisions relating to the appointment of ports, quays, and wharves for the landing and shipping of goods, and also to bonded warehouses and boarding stations. At section 39 there commence elaborate provisions in regard to importation, prohibition, landing and warehousing of goods ; and from section 100 we have a series of provisions in reference to the exportation of goods and clearance of ships to parts beyond the seas, including provisions in regard to the shipment of stores for the use of the ship. Then there follow sections which relate to coasting trade, bonds and other securities and the making of false declarations. This brings us to section 169 where there commence a number of provisions designed primarily to prevent smuggling. It is in this portion of the Act that we find section 177 which renders liable to forfeiture goods unshipped without payment of duty, and prohibited goods which have been imported or brought into the United Kingdom, or which have been brought to a quay, wharf, or other place in the United Kingdom in order to be put on board a ship for the purpose of

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being exported, and also section 186 under which the present prosecution is brought.

These provisions against smuggling related principally to the importation of goods into the United Kingdom; but when the present war broke out it became necessary, just as it was in the war of 1914-18, to prohibit the export as well as the import of certain goods; and once again it was found convenient to amend the existing statute by bringing within its ambit various classes of goods the exportation of which was prohibited by Proclamation; and the law was strengthened also by the passing on 1st September, 1939, of the Import, Export and Customs Powers (Defence) Act, 1939, (hereinafter called "the Act of 1939") to which I have already referred.

Now section 186 of the Act of 1876 created several offences—illegal importing, unshipping, removing imported goods from any ship, quay, wharf or other place previous to examination, and carrying goods into a warehouse without authority. Another offence—the one alleged to have been committed in this case—is where a person "shall knowingly harbour . . . any "prohibited . . . goods." Next there follow words which render it likewise unlawful to be knowingly concerned in carrying . . . ,or in any manner dealing with any such goods "with intent to defraud Her "Majesty of any duties due thereon, or to evade any "prohibition or restriction of or applicable to such "goods."

A doubt arose upon the construction of this section as to whether these latter words relating to intent applied to all the offences mentioned in the section or whether this unlawful intent was only an ingredient in the "carrying" offence immediately preceding them. This doubt was resolved by the case of *Frailey v. Charlton* (1), in which it was held that to constitute the offence of "knowingly harbouring prohibited "goods" under the section it is not enough that the party charged had such goods in his possession with intent to convey them out of the United Kingdom; he must have done so "with intent to evade the pro-

(1) [1920] 1 K.B. 147.

"hibition." Accordingly, ignorance of the prohibition against the export of the goods in question—soap—was held to constitute a good defence, for there could be no intent to evade a prohibition the existence of which was not known to the party charged.

It was in this state of the law that the Act of 1939 was passed. By section 1 the Board of Trade are empowered by order to make such provisions as they think expedient for prohibiting or regulating the importation into or exportation from the United Kingdom, or the carriage coastwise or the shipment as ships' stores, of all goods or goods of any specified description; and by section 3 (1) it is enacted as follows:—

"If any goods—

"(*a*) are imported, exported, carried coastwise "or shipped as ships' stores in contra- "vention either of an order under this Act "or of the law relating to trading with "the enemy, or

"(*b*) are brought to any quay or other place, or "waterborne, for the purpose of being "exported or of being so carried or shipped "in contravention either of an order under "this Act or of the law relating to trading "with the enemy,

"those goods shall be deemed to be prohibited "goods and shall be forfeited."

The sub-section concludes with the imposition of a customs penalty of £500.

Thus, if goods fall within either limb of the section they are deemed to be prohibited goods; and, accordingly, a person who knowingly harbours them with intent to evade the prohibition applicable thereto commits an offence under section 186 of the Act of 1876. It is the second limb—sub-section (*b*)—which alone is applicable to the facts of the present case. There was no actual exportation or importation, carriage coastwise or shipping as ships' stores. The allegation is that the goods were brought to a place within sub-section (*b*) for the purpose of being exported.

I now pass on to section 3 (3) of the Act of 1939,

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which, so far as relevant to the present case, reads as follows :—

"If any goods are . . . brought to any quay or "other place . . . for the purpose of being exported "... an officer of Customs and Excise may require "any person possessing or having control of the "goods to furnish proof that the . . . exportation "... of the goods . . . is not unlawful by virtue "either of an order under this Act or of the law "relating to trading with the enemy ; and if such "proof is not furnished to the satisfaction of the "Commissioners of Customs and Excise, the goods "shall be deemed to be prohibited goods unless the "contrary is proved."

The concluding part of this sub-section—from the words "the goods shall be deemed"—were amended by an Order in Council of 19th March, 1942 (S.R. & O. 1942. No. 502) which introduced an express provision for forfeiture ; but such amendment was subsequent to the commission of the offence alleged in the present case, and it is in any event irrelevant for the purposes of our present enquiry.

Let us now consider what section 3 (3) of the Act of 1939 as set out above does, and also what it does not do. It is a "deeming" section, deeming goods in a certain event to be prohibited goods unless the contrary is proved. What is that event ? It is when an Officer of Customs and Excise has required a person who has possession or control of goods to furnish proof that the exportation is *not unlawful*, and such proof is not furnished to the satisfaction of the Commissioners. When, then, is the officer empowered to require such proof ? The answer is when, and only when, the goods "are brought to any quay or other place for "the purpose of being exported." It would be absurd to ask a person to furnish proof that exportation of goods in his possession was not unlawful if exportation had neither taken place nor was intended. This intended exportation, then, is the basic fact which must be established before the machinery of the sub-section comes into operation in a case such as the present. If that fact is once established, if the customs

officer makes the request which he is in such case authorised to make, and if the required proof is not furnished, then, but only then, the onus is thrown on the defendant to show that the goods are not prohibited. But this contemplated exportation was not admitted by the defendant, or in any other way established by the complainant when he required proof under the section in the present case. It is, in fact, the one matter still in real issue, the defendant's case being that the goods were in his possession, not for exportation, but merely for the purpose of his normal trade as a grocer in Northern Ireland. For these reasons I am of opinion that this sub-section 3 (3) has no application to and cannot be relied upon by the complainant in the present case, and that the onus lies upon him to prove that the goods were brought to the place where they were found for the purpose of being exported. The answer to question 1 above is therefore in the affirmative.

The next question arising on the case is as to whether it is incumbent on the complainant to establish the existence of a *mens rea* or guilty mind on the part of the defendant. On this issue I have no doubt. Section 3 (3) of the Act of 1939 does not in my opinion affect this question in any way. Assuming it to be established that the goods are prohibited goods, and that a charge of harbouring them is brought, it is to section 186 of the Act of 1876 that we are obliged to look for the purpose of seeing the nature of the charge and what its proof involves. The relevant portion of the section affects every person who "shall *knowingly* "harbour . . . prohibited . . . goods." I emphasise the word "knowingly" which, vitally important though it is, is inadvertently omitted from the first question submitted to us in the Case Stated. The matter of *mens rea* does not, however, rest here. I have already referred to *Frailey v. Charlton* (1), as establishing the necessity for proof in a harbouring charge of an intent to evade the prohibition. This is a further essential factor in the nature of *mens rea* which it is necessary for the complainant to prove by

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evidence before the offence can be said to be completely established. The answer to question 2 above is therefore also in the affirmative.

Before leaving this question, however, I feel it right to make some further observations. I am of course well aware of the principle which we recognised recently in the Court of Appeal in the case of *Barnett v. Commissioner of Valuation* (1), that subsequent statutes are relevant only as parliamentary exposition of *prior* statutes or as forming a glossary for the proper interpretation of expressions considered to be left in doubt. Therefore, have I interpreted section 3 (3) of the Act of 1939 without any reference to an Order in Council (1942 No. 502) made under the Emergency Powers (Defence) Acts, 1939 and 1940, on 19th March, 1942. Having arrived, however, at my construction of section 3 (3) upon the language of that section alone it is not uninteresting to note that the legislature by this new Order 76A (2) provided that section 3 (3) of the Act of 1939 should have effect as if the power thereby conferred on an officer of Customs and Excise in the case of goods brought to any quay or other place for the purpose of being exported (N.B.—Only in this case) to require any person possessing or having control of the goods to furnish proof that the exportation of the goods is not unlawful . . . included power in the case of any goods which—

(*a*) are found at any place in Northern Ireland ; and

(*b*) the officer suspects to be intended for exportation,

to require any person possessing or having control of the goods to furnish proof either that the goods are not intended for exportation or that the exportation thereof is not unlawful as aforesaid.

This Regulation appears to me to recognise fully the limited scope and operation of section 3 (3) of the Act of 1939 and the difficulties with which Customs officers were accordingly confronted in proving their cases. To remedy this, amendment was effected by the Regulation under which the power of requiring a person to furnish the proof referred to arises even though the officer only *suspects* the goods to be intended

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for exportation ; and it widens the nature of the proof which may be furnished so as not necessarily to be confined to proof that the exportation is not unlawful, but, as an alternative, that the goods are not intended for exportation at all. To this extent onus of proof is affected by the new Regulation in a manner which may be helpful to the Customs authorities in subsequent cases ; but as this Order was not in existence when the present case was heard at Petty Sessions its provisions cannot be availed of in these proceedings.

Finally, I am clearly of opinion that the words " or other place " in section 3 (1) (*b*) and section 3 (3) of the Act of 1939 are not to be construed as *ejusdem generis* with the word " quay," the effect of which would be to limit them to something like a jetty, wharf, or dock bordering upon or jutting out into a harbour or sea. I can find no authority which would justify such a restricted interpretation. No doubt the words " quay," " waterborne," and " shipped "—all of which occur in these sub-sections—suggest, as is natural in the case of an Island Kingdom, the idea of export by sea ; and, indeed, until the constitution of the Irish Free State in 1922 took that area outside the United Kingdom, all export of goods from the Kingdom would necessarily have been by sea. Even as the law stood in those days, however, I would have hesitated to give the suggested *ejusdem generis* meaning to the words " or other place." In my opinion the words " quay, wharf, or other place " in section 177 of the Act of 1876 or the words " quay or other place " in section 8 of the Customs and Inland Revenue Act, 1879, though in each case linked up with the idea of shipping for exportation from the United Kingdom, would in my opinion have included a store, shed, or warehouse, not necessarily adjoining a harbour or sea, in which goods might have been conveniently collected, assembled or placed prior to shipping for exportation. It would have been the duty of a Court in interpreting such words to have had regard to the evil of smuggling against which the words were designed, and, in so far as the words used reasonably permitted, to give full effect to that object. If this

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view be correct it is still easier to give such a meaning to the words " quay or other place " in sections 3 (1) (*b*) and 3 (3), where, with apparently an appreciation of the new land boundary of the United Kingdom, export is not confined to export by ship. In this respect it follows on the lines of the Customs (Land Boundary) Regulations, 1923, which were made by the Commissioners of Customs and Excise under section 4 of the Irish Free State (Consequential Provisions) Act, 1922, clause 12 (1) of which enacts that the provisions of the Customs Acts, other than certain specified sections immaterial for our present purposes, shall so far as they are applicable, and subject to the modifications contained in the Regulations, apply to goods imported into and exported from Northern Ireland otherwise than by sea or in aircraft as they apply to goods imported into or exported from Northern Ireland by sea. In furtherance of the same object sub-clause (2) enacts that the provisions of the Customs Acts specified in the Second Schedule thereto should have effect in relation to goods imported into or exported from Northern Ireland otherwise than by sea or in aircraft subject to the modifications specified in the fourth column of such Schedule. An examination of this Schedule shows that the modifications principally effected, not only in sections 177 and 186 but in several other sections of the Act of 1876, and in section 8 of the Act of 1879, were the deletion of such words as " ship," " shipped," " shipment " and " re-landed," and the substitution in appropriate cases of such words as " train or vehicle," " unlading," " exportation " and " re-imported."

When due regard is had to the existence of a land boundary at the date of the passing of the Act of 1939, to the recognition of this land boundary in prior legislation, and when there is also borne in mind the extent to which smuggling has for many years past been carried on over this land boundary, I refuse to place upon the words " any quay or other place " the limited meaning contended for by the defendant. On the contrary, I am compelled to assign to them their ordinary, their natural and their general significa-

tion. In short, I read the word "any" both with the word "quay" and with the words "other place," so that the phrase in my opinion means "any quay "or any other place," that is, any place where goods may be assembled for exportation. Why should the act be lawful merely because the assembly for exportation takes place in the defendant's own premises rather than on the quayside? I regard the word "quay" as taken from earlier Acts for merely illustrative purposes rather than as intended by the legislature to be exhaustive or definitive of the place to which the goods must be "brought for the purpose "of being exported." in order to bring the case within section 3 (1) (*b*) of the Act of 1939. The answer to the third question is therefore in the negative.

We shall send the case back to the Magistrate with our answers to the questions as above mentioned, and with a direction that he shall proceed as to justice may appertain. The defendant is entitled to his costs of this case stated which we measure at twenty guineas.

BROWN, J.: I concur.

Solicitor for the complainant: *The Chief Crown Solicitor.*

Solicitor for the defendant: *J. G. Lennon.*

J. McC.

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1941.

In re FERGUSON'S PATENT.

Oct. 22.

Patent—Extension of term—Time within which petition must be presented—Computation—Patent and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *sec.* 18, *sub-s.* 1—*Patent and Designs Act* 1919, (9 *&* 10 *Geo.* 5, *c.* 80), *sec.* 6, *sub-s.* 1, *sec.* 7, *sub-s.* 1—*Patent and Designs Act*, 1932 (22 *&* 23 *Geo.* 5, *c.* 32), *sec.* 13.

A patent was granted on 12th February, 1925, for the term of fourteen years, which by the Patents and Designs Acts, 1919, was increased to sixteen years. On 12th February, 1941, the patentee presented a petition to the Court praying that the patent should be extended for a further term.

Held, that the patent had expired before the presentation of the petition and the Court had no jurisdiction to hear it.

Petition presented on 12th February, 1941, praying for the extension of a patent granted on 12th February, 1925, for the term of fourteen years increased by the Patents and Designs Act, 1932, to sixteen years.

Chambers, K.C., and *Patton* for the Comptroller-General of Patents and Trade Marks. There is a preliminary objection to the hearing of the petition, it was presented out of time and the Court has no jurisdiction to hear it. By the Patents and Designs Act, 1907, sec. 18, it is provided that a petition praying for the extension of a patent must be presented at least six months before the time limited for its expiration. By the Patents and Designs Act, 1932, sec. 13, it is provided " that the Court may allow such a petition " to be presented at such time, not being later than " the time limited for the expiration of the patent, " as the Court may in its discretion think fit " ; this

NOTE.—The Comptroller General of Patents, Designs and Trade Marks in exercise of the powers conferred by the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, extended the time for presenting a petition for the extension of the patent to 7th February, 1942. The patentee on 20th January, 1942, presented a new petition for such extension which Megaw, J., held he had jurisdiction to hear.

patent had expired before the petition was presented. In *Russell v. Ledsam* (1), Park, B., said : " But in this " case the question is when the term given by the " patent commences, and the same rule would apply " as to the commencement of a term, which, if it is to " run from the date of the lease includes the day of " the date. It was asked whether if there had been " an imitation of the invention on the day the patent " was dated, it would have been an infringement of it, " and we have no doubt that the answer ought to be " that it would, and if so the day of the date would " be included." This patent expired at midnight on 11th February. In *English v. Cliff* (2), Warrington, J., refers with approval to *Russell v. Ledsam* (1). In no case has it ever been held that the day of the date of a patent is not included in the term for which the patent is granted.

Beattie, K.C., Warnock, K.C., and *Belford* for the petitioner :—

In *Williams v. Nash* (3), it was held that in computing time under the Act 16 Vict., c. 5, sec. 2, avoiding letters patent on failure in payment of stamp duties, the day of the date of the patent is excluded. The term of this patent did not expire until twelve o'clock at night of the anniversary of the day on which the patent was granted, that is 12th February.

MEGAW, J. : I am satisfied that I have no jurisdiction to hear this petition. MEGAW, J.

Solicitor for the petitioner : *W. K. Gibson.*

Solicitor for the Comptroller-General of Patents, Designs and Trade Marks : *J. B. Getty.*

J. McC.

(1) 14 M. & W. 574.
(2) [1914] 2 Ch. 376.
(3) 28 L.J.Ch. 886.

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MASTER AND SERVANT—*Liability of A. for negligence of his servant employed under the control of B.—Negligence—Dangerous object—Petrol—Smoking—Scope of employment.* By a policy of insurance the Respondents were indemnified by the Appellants against loss or damage caused by the use of a certain motor lorry their property. Under an agreement with

H. M. D. the Respondents were bound to deliver petroleum spirit for H. M. D. by lorries which were to be loaded at L. or such other place as H. M. D. should direct, to keep at L. sufficient lorries to transport such spirit,to keep it insured while in transit against fire and spillage, to dress all their employees engaged in such delivery in such uniforms and liveries as H. M. D. might direct, and under the said agreement all employees of the Respondents engaged in such delivery were to accept and obey the orders of H. M. D. or their representatives regarding such delivery, the payment of accounts and all matters incidental thereto, provided that nothing therein contained should be taken as meaning or implying that such employees of the Respondents were in any way the employees of H. M. D., and the Respondents were to be responsible to H. M. D. for all losses which H. M. D. might sustain through any tort, misdemeanour, negligence or default of which any of their employees might be guilty. On 2nd August, 1937, the lorry, driven by D., received petrol at H. M. D.s installation at L. for delivery into the storage tank of J. C. D. drove the lorry to J. C.'s garage, inserted the nozzle of the delivery hose into the manhole of J. C.'s tank, turned on the stop-cock, and the petrol began to flow into the tank ; while the petrol was flowing, D. lit a cigarette and threw the match on the floor of the garage. The match ignited some material on the floor and a fire started, causing an explosion which destroyed the lorry, and a motor car and damaged eleven houses ; the motor and the eleven houses were the property of third parties. Differences arose between the parties as to the liability of the Respondents to make good the losses sustained by reason of the damage done to the lorry, the motor car and the houses, and the matters in dispute were referred to arbitration. The arbitrator stated certain questions of law which arose in the course of the reference, in the form of a special case for the determination of the Court. *Held* by the House of Lords :—(1) That D. when the accident happened was acting as the servant of the Respondents ; (2) That the act of D. in lighting a cigarette and throwing the match on the floor of the garage amounted in the circumstances, to negligence within the course of his employment, for the consequences of which his master was responsible. *Jefferson v. Derbyshire Farmers, Ltd.* ([1921] 2 *K.B.* 281) approved. *Century Insurance Co. Ltd., Appellants, Northern Ireland Road Transport Board, Respondents.* H.L. 47

MATRIMONIAL CAUSES ACT, 1939 (2 & 3 *Geo.* 6, *cap.* 13), *sec.* 19, *ss.* 1, 2—*Desertion by wife—Order for wife's maintenance—Practice in applications for such order.* The Court may on a decree for divorce, notwithstanding any misconduct on the part of the wife, order that the husband shall secure to her a sum of money, or an annual sum, or may direct the husband to pay to her a weekly or monthly sum. *Hunter v. Hunter.* .. K.B.D. (MATRIMONIAL) .. 40

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nature of capital, but was in the nature either of assets and distributable according to sect. 44 of the Partnership Act, 1890, or in the nature of profits and distributable as profits in equal shares under the partnership agreement. *McClelland v. Hyde.* .. .. .. C.A. 1

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PETTY SESSIONS—PROSECUTION—*Dismiss of summons with costs—Right of Appeal to Quarter Sessions—Summary Jurisdiction and Criminal Justice Act* (*Northern Ireland*), 1935 (25 & 26 *Geo.* 5, *c.* 13), *sec.* 24, *sub-sec.* 1. The defendant, who was carrying on a business as a haulier the goodwill of which was of value, was prosecuted at Petty Sessions for breach of the Road and Railway Transport Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 15), sec. 15, sub-sec. 1, by which it is enacted that no person other than the complainants shall use a motor vehicle on any public highway for the carriage of merchandize for hire except with the consent of the complainants and the approval of the Ministry of Home Affairs. The defendant admitted that he had committed the acts complained of in the summons, but contended that the Act in effect took from him goodwill his property, and in so far as it did so was *ultra vires* of the Parliament of Northern Ireland which by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, cap. 67), sec. 5, sub-sec. 1, is prohibited from making any law so as either directly or indirectly to take any property without compensation. At Petty Sessions the Resident Magistrate dismissed the summons and ordered that the complainants should pay the defendant eight guineas cost. The complainants appealed to the Court of Quarter Sessions. At the Court of Quarter Sessions the Deputy Recorder of Belfast affirmed the decision of the Resident Magistrate with costs. but stated a case for the opinion of the Supreme Court on the point of law relied on by the defendant. The Case Stated was heard by the Court of Appeal which reversed the order of the Resident Magistrate. On appeal by the defendant to the House of Lords. *Held*, that the order made at Petty Sessions for the payment by the complainants of the defendant's costs was not an order "for payment "of any penal or other sum" within the meaning of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 13), sec. 24, sub-sec. 1; and that no appeal lay against the dismissal of the summons. *Benson v. Northern Ireland Road Transport Board* .. .. .. H.L. 61

I. PRACTICE—PROBATE—*Grant of administration intestate though will in existence—Non-compliance with citation to lodge Letters of Administration—Form of order.* J. D. died leaving a will by which he appointed three executrices of whom M. M. was the survivor. W. D., one of the children of the deceased man, applied for and obtained a grant of Letters of Administration of the estate as on an intestacy. On the application of M. M. a citation was issued commanding W. D. to bring into the Probate Registry the Letters of Administration and to show cause why they should not be revoked. This citation was not obeyed. M. M. then applied for an Order directing W. D. to lodge the Letters of Administration in the Probate Registry for the purpose of having the grant cancelled. Andrews, L.C.J., made an order directing W. D. to bring in and lodge the Letters of Administration within a specified time, and that in default thereof the applicant should be at liberty to apply for an Order for the attachment of W. D. *In the*

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RATING—"*Freight Transport Hereditament*"—*Grain Silo*—"*Dock Undertaking*"—*Rating and Valuation (Apportionment) Act (Northern Ireland)*, 1928 (18 *&* 19 *Geo.* 5, *c.* 30, *secs.* 1, 6, 7)—*Construction of Statute—Regard to terms of subsequent statute.* The B. Harbour Commissioners granted to W. & R. B., Ltd., who carried on business as grain importers, a lease of land described as situate adjacent to the North corner of one of the lessor's docks and which was bounded in all sides by other property of the lessors with liberty to construct and maintain on the demised premises and on a specified area, the property of the lessors adjoining the dock, certain elevators, subways and gantries for discharging grain from ships and delivering it into a grain silo which the lessees thereby covenanted to build. The lease also conferred on the lessees the preferential use of specified portions of the quays adjoining the dock for the discharge and loading of grain in connection with the silo. The silo was built, and was maintained, by the lessees; the distance from the wall of the dock to the nearest part of the silo was 13 feet 10 inches; that intervening part was not included in the lease. By the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928 (18 & 19 Geo. 5, c. 30), which is stated in the preamble to have been passed with a view to the grant of relief from rates in respect of certain classes of hereditaments, it was enacted that the valuation lists made under the Irish Valuation Acts should show what hereditaments are "freight transport "transport hereditament" is defined as *inter alia*, "a hereditament having a "net annual value exceeding £20 "occupied and used wholly or partly "for dock purposes as part of a dock "undertaking, being an undertaking "whereof a substantial proportion of "the volume of business is concerned "with the shipping and unshipping of "merchandize not belonging to or "intended for the use of the undertakers"; "dock purposes" are defined as "all purposes connected "with the shipping or unshipping at "a dock of . . . merchandize"; "dock" is defined as including "any "harbour, wharf, pier, jetty or other "works, in or at which vessels can "ship or unship merchandise or "passengers, not being a pier or jetty "primarily used for recreation"; and "dock undertaking" is defined as meaning "an undertaking carried "on by a dock authority" but as also including "any other undertaking "(not carried on by a county council "or urban district council) comprising "as part thereof a dock in so far only "as its business is carried on at and in "connection with that dock." The B. Harbour Commissioners are such a dock authority. By the Local Government (Rating and Finance) Act (Northern Ireland), 1929, a partial relief from rates is granted in respect of hereditaments shown in the valuation lists as freight transport hereditaments. *Held*, by the Court of Appeal (Andrews, L.C.J., Babington and Murphy, L.JJ.):—1. That W. & R. B., Ltd., were not entitled to have the

premises shown in the valuation list as a freight transport hereditament. 2. That the Court in considering a question as to the construction of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, was entitled to consider the Local Government (Rating and Finance) Act (Northern Ireland), 1929. *W. & R. Barnett, Ltd., v. Commissioner of Valuation.* .. .. .. C.A. 20

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greater part of the work of a joiner, but that its success was doubtful, and he advised the appellant not to undergo it. The appellant refused to undergo the operation. On the hearing of an application by the appellant for an award of compensation the Recorder of Belfast held that the operation was one which a man in the appellant's condition might reasonably undergo, that it afforded a reasonable chance of relief from pain and of ability to do some work, and that the alternative was a lifetime of pain and idleness, but that he could not hold the appellant unreasonable in following the advice of a competent surgeon, and he awarded compensation to the appellant. *Held*, that the appellant was entitled to compensation. Decision of the Court of Appeal in Northern Ireland [1941] N.I. 133, reversed. *Steele v. Robert George & Co. (1937), Ltd.* .. .. H.L. 72

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